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JUDICIAL REVIEW LEGISLATION

HEARING

BEFORE THE

COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

SECOND SESSION

ON

S. 11, The Proposed Veterans' Administration Adjudication Procedure and Judicial Review Act, and S. 2292, Veterans' Judicial Review Act

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APRIL 28, 1988

Printed for the use of the Committee on Veterans' Affairs

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CONTENTS

APRIL 28, 1988

Page
Judicial Review Legislation 1

STATEMENTS BY COMMITTEE MEMBERS

Chairman Cranston 1
    Prepared statement of Chairman Cranston 109
Senator Graham 126
Senator Matsunaga 123
Senator Murkowski 3
Senator Simpson 7
Senator Thurmond 4

WITNESSES

Arnold, Hon. Morris S., Judge, U.S. District Court for the Western District of Arkansas 41
    Prepared statement of Judge Arnold 318
Bennett, Susan D., Esq., Assistant Professor of Law and Director, Public Interest Law Clinic, Washington College of Law, American University, Washington, DC 5
    Prepared statement of Ms. Bennett 127
Breyer, Hon. Stephen G., Judge, U.S. Court of Appeals for the First Circuit 42
    Prepared statement of Judge Breyer 318
Burch, J. Thomas, Jr., Chairman, National Vietnam Veterans Coalition, accompanied by William T. Bennett, General Secretary 51
    Prepared statement of Mr. Burch 391
Cushman, Philip, President, Veterans Due Process, Inc., accompanied by Sidney Cooper, National Legislative Director 52
    Prepared statement of Mr. Cooper 397
Daschle, Hon. Thomas A., a U.S. Senator from the State of South Dakota 47
    Prepared statement of Senator Daschle 380
Fidell, Eugene R., Partner, Klores, Feldesman & Tucker, Washington, DC 10
    Prepared statement of Mr. Fidell 158
Heilman, John F., National Legislative Director, Disabled American Veterans, accompanied by Joseph Zengerle, Esq 37
    Prepared statement of Mr. Heilman 277
Ivers, Donald L., General Counsel, Veterans' Administration 54
    Prepared statement of Mr. Ivers 490
Kerry, Hon. John F., a U.S. Senator from the State of Massachusetts 17
    Prepared statement of Senator Kerry 170
Legarreta, Dr. Dorothy, President, National Association of Radiation Survivors 49
    Prepared statement of Dr. Legarreta 389
Magill, James N., Director, National Legislative Service, Veterans of Foreign Wars of the United States 39
    Prepared statement of Mr. Magill 312
O'Dell, Richard E., Vice President, Vietnam Veterans of America, accompanied by Paul S. Egan, Legislative Director; and Joseph Forcillo, Senior Analyst, Cambridge Survey Research 35
    Prepared statement of Mr. O'Dell 216
    Additional comments of the Vietnam Veterans of America 271
Powell, R. Jack, Executive Director, Paralyzed Veterans of America 34
    Prepared statement of Mr. Powell 191

Page
Riggin, E. Philip, Director, National Legislative Commission, The American Legion 28
Prepared statement of Mr. Riggin 177
Rosenberg, Keith A., Esq., Whiteford, Taylor & Preston 14
Prepared statement of Mr. Rosenberg 164
Weil, Frank E.G., National Secretary, American Veterans Committee 49
Prepared statement of Mr. Weil 383

APPENDIX

Bills:

S. 11—A bill to amend title 38, United States Code, to establish certain procedures for the adjudication of claims for benefits under laws administered by the Veterans' Administration; to apply the provisions of section 553 of title 5, United States Code, to rulemaking procedures of the Veterans' Administration; to provide for judicial review of certain final decisions of the Administrator of Veterans' Affairs; to provide for the payment of reasonable fees to attorneys for rendering legal representation to individuals claiming benefits under laws administered by the Veterans' Administration; and for other purposes 67
S. 2292—A bill to amend title 38, United States Code, to provide for judicial review of rulemaking by the Veterans' Administration, to allow attorneys' fees in cases involving veterans' claims for benefits, and to make other improvements in the provision of veterans' benefits 97
Explanatory Statement on the Compromise Agreement on S. 11 as amended, the "Veterans' Judicial Review Act" 733
Division A—Veterans' Judicial Review, Public Law 100-687 759

Statements:

Breger, Marshall J., Chairman, Administrative Conference of the United States 520
Califa, Antonio J., Legislative Counsel, and Morton H. Halperin, Director, Washington Office, on behalf of the American Civil Liberties Union 531
Evans, Robert D., Director, American Bar Association, Governmental Affairs Office 548
Jackson, Charles R., Vice President, Government Affairs, Non Commissioned Officers Association of the United States of America 550
Litz, Jack, National Commander, Jewish War Veterans of the United States of America 559
Mashaw, Jerry L., William Nelson Cromwell Professor of Law, Yale University 561
Milliken, Christine T., Executive Director/General Counsel, National Association of Attorneys General 570
Perkins, Jack E., for Thomas M. Boyd, Acting Assistant Attorney General, U.S. Department of Justice, Office of Legislative Affairs 572
Smith, Lucius, III, Executive Director, National Association of Atomic Veterans 577

Written committee questions and the responses:

Chairman Cranston to:

Arnold, Hon. Morris S., Judge, U.S. District Court for the Western District of Arkansas 579
Bennett, Susan D., Esq., Assistant Professor of Law and Director, Public Interest Law Clinic, Washington College of Law, American University, Washington, DC 596
Breyer, Hon. Stephen G., Judge, U.S. Court of Appeals for the First Circuit 579
Disabled American Veterans 598
Paralyzed Veterans of America 623
Rosenberg, Keith A., Esq., Whiteford, Taylor & Preston 626
The American Legion 638
Veterans' Administration 640
Veterans of Foreign Wars of the United States 682
Vietnam Veterans of America 684

Senator Murkowski to:

Evans, Robert D., Director, American Bar Association, Governmental Affairs Office 698
Vietnam Veterans of America 703

JUDICIAL REVIEW LEGISLATION

THURSDAY, APRIL 28, 1988

U.S. Senate,
Committee on Veterans' Affairs,
Washington, DC.

The committee met, pursuant to notice, at 9:04 a.m., in room SR-418, Russell Senate Office Building, Hon. Alan Cranston (chairman of the committee) presiding.

Present: Senators Cranston, DeConcini, Graham, Murkowski, Simpson, and Thurmond.

OPENING STATEMENT OF CHAIRMAN CRANSTON

Chairman Cranston. Good morning and welcome to today's hearing on judicial review. At the outset, I would like to thank all the witnesses for their cooperation and understanding regarding the postponement of this hearing from April 21 in order to hear testimony on S. 2292, legislation introduced by Frank Murkowski on April 18.

Testimony this morning will focus on S. 11, a bill to codify some of the existing beneficial VA adjudication procedures, allow review of rules and regulations, provide an opportunity for a veteran to seek judicial review of a final decision of the Board of Veterans' Appeals in the Federal court, and allow claimants to pay attorneys' reasonable fees for representation before the BVA, but only after an initial BVA decision and for representation in court, as well as on S. 2292, which has set up procedures for review of regulations by the BVA and the U.S. Court of Appeals, provide for review of rulemaking, and seeks to give the BVA more independence.

Although there are significant differences both in the philosophy reflected and the actual provisions, there are a number of similarities between the two bills.

Clearly, the introduction of S. 2292 changes the equation somewhat. It provides us with new alternatives to consider, new support for some forms of judicial review, and yet another opportunity to reexamine and reevaluate S. 11.

It is the committee's goal, and I am confident that Senator Murkowski will agree with me, to report out the best judicial review bill possible in light of all the factors involved.

I want to be clear that my motivation in continuing the push for judicial review is the belief that it is a fundamental right which should be afforded to all veterans.

As I said in 1979 in presiding over hearings on the first judicial review bill, "My goals in this area are very simple. I want all veterans to be served with compassion, fairness, and efficiency, and I want each individual veteran to receive from the Government every benefit and service to which he or she may be entitled under law." Those continue to be my goals.

In the past, I have said that the need for judicial review does not depend on whether or not the present system of claims adjudication is broken. I continue to believe that is true. In the past year or two, however, it has become increasingly clear that the entire claims adjudication process, including the BVA, has some serious problems.

Although the GAO is currently conducting the in-depth study of regional office claims adjudication that I requested with Representative Don Edwards—and the committee has not yet completed a comprehensive review of the BVA, which is under way and will include an oversight hearing in the near future—I believe we know enough to conclude that these adjudication processes need fixing.

The Chairman of the BVA commented during a recent House hearing that even the specter of judicial review has made some of the people reviewing BVA claims more careful to see that the board does everything that it can.

Certainly, the reality of judicial review of BVA decisions would have a similar, though more pronounced, effect. Although judicial review has been surrounded by its share of controversy, I note that S. 11, as did its nearly identical predecessor, S. 367, which was previously favorably reported by this committee while Senator Murkowski was chairman, has a strong bipartisan support of 29 cosponsors, including my good friends and colleagues on this committee, our former chairman, Senator Simpson, and Senators Matsunaga, DeConcini, Mitchell, Rockefeller, and Stafford.

A discussion of the history of S. 11, along with a closer look at the differences between S. 11 and S. 2292, is contained in my long statement, which is available at the press table.

I look forward to hearing the testimony today and working with Frank Murkowski and our colleagues in the Senate, as well as our colleagues in the House Veterans' Affairs Committee, to develop a conceptual approach on this important issue.

Before we begin with the testimony, a word to our witnesses. Please conform to the time limits for summarizing your prepared testimony. Each individual witness and the witnesses for each organization have been allotted a total of 5 minutes for your verbal presentation.

In those instances, where there is more than one witness for your organization, you can divide your 5 minutes between you in any manner that you wish. In order to allow each viewpoint to be expressed and for questions to be asked and answered in the time available, we must strictly enforce the 5-minute rule. So, please conclude your remarks when you see the red light.

The written testimony of each witness will appear in full in the hearing record. Again, I thank all of our witnesses for their cooperation and for getting their testimony to us, in almost all cases, well in advance of the hearing. That was very helpful.

Frank, do you have any opening statement?

[The prepared statement of Chairman Cranston appears on p. 109.]

OPENING STATEMENT OF SENATOR MURKOWSKI

Senator MURKOWSKI. Thank you very much, Mr. Chairman. It is a pleasure to be with you this morning, and I wish you and our witnesses and those that are here a very good morning.

I want to begin by complimenting you and your staff on the hard work and the perseverance on the issue of judicial review. As we know, bills more or less the same as this bill, S. 11, have been passed by the Senate for, I believe, the past four Congresses. As we also know, none of these bills has become law.

But in this Congress, we have something a little different. I introduced a bill, S. 2292, the "Veterans' Judicial Review Act," which provides for judicial review, but which I think takes a different and a fresh approach from S. 11 and its predecessors in this body.

Briefly put, S. 2292 permits judicial review of broadly applicable VA rules and regulations. It does not permit review of individual benefit decisions, and I really think it is a much more practical approach.

I think it is worthwhile to reflect for a moment on the reasons for the past disapproval of our judicial review bills. It is not enough to simply say that we cannot understand opposition to these bills. It is not enough, I do not think, to say, and I quote, "Illegal aliens can get into court; why can't veterans?"

When we propose changes to the VA's claim process, we have to keep in mind that we are dealing with a system that has been operating in much the same way for more than 50 years. I don't question the fact that there have been some bad decisions within the Veterans' Administration, and I am moved and troubled by such reports.

At the same time, however, I am reminded of the words of Justice Holmes, who said "Hard cases make bad law." There are cases where review in Federal District Courts would be the answer; there are probably cases which deserve a full-blown trial. But I don't think we should prescribe an entirely new system of review to solve what I believe are a relatively small number of nonrepresentative cases, however meritorious those particular cases might be.

There is clearly merit in the current system. The system of veterans' claims adjudication is set up to be nonadversarial. The Veterans' Administration has—and, I believe, recognizes—a responsibility to assist veterans in developing their claims.

There is a reason for that kind of system, and the reason is this. Veterans are very, very special. They are a special class of our citizens, a special class that has given so much to their country, a class whose country, can never fully repay for the sacrifices they have made.

These men and women have agreed to put themselves in harm's way in the service of our Nation. There is, Mr. Chairman, really no other class of citizens like our veterans.

The Congress has historically granted special benefits for these men and women, as it should, and the Congress has historically attempted to make it easy and relatively inexpensive to claim those benefits.

That desire is, after all, the genesis of the attorney fee limitation. That desire is the genesis of the presumptive periods which exist for many diseases. That desire is the genesis of the many educational improvements this committee has championed over the years on behalf of veterans.

This is not, Mr. Chairman, the way we treat welfare recipients. This is not the way we treat illegal aliens and criminals. Veterans are special, and the system that has grown around the provision of their benefits is also very special. We should not lightly walk away and change that system.

I do not mean to imply that S. 11 and its predecessors in this body have attempted to necessarily make changes without careful consideration; I don't mean that at all. And yet, we must realize that the kind of opposition our bills have generated must mean something.

I think that opposition means that we should try, if possible, to maintain the nonadversarial system while still providing meaningful review of the VA decisionmaking process. In this regard, I note that many of the veterans' service organizations which have constantly opposed review of individual fact situations have just as consistently supported review of legal questions.

And the review of legal questions is what my proposed bill is all about. It preserves the best and the most distinctive parts of the system, while providing the opportunity for truly broad challenges to that system, when and if appropriate.

S. 2292 is, I believe, a meaningful and a realistic compromise between two positions which have polarized their supporters for more than a decade.

Mr. Chairman, I thank you very much for having the hearing this morning. I look forward to the testimony of the witnesses. Unfortunately, as you know, we have action on the floor that I am going to be involved in, and I gather later you and I are going to be involved in a little veterans' urgent supplemental legislation as well.

Chairman **Cranston**. I guess that is not coming up right away, however.

Senator **Murkowski**. No, but something else is.

Chairman **Cranston**. I know. [Laughter.]

Several things are happening in several places unfortunately. We have an opening statement from Senator Matsunaga which will appear in the record.

[The prepared statement of Senator Matsunaga appears on p. 123.]

Chairman **Cranston**. I would now like to call and welcome Susan Bennett, the current Director of the Public Interest Law Clinic at American University and an Assistant Professor of Law at the Washington College of Law; Eugene Fidell, a military law expert, who is a partner in the law firm of Klores, Feldesman and Tucker; and Keith Rosenberg, a private practitioner, with the law firm of Whiteford, Taylor and Preston.

I thank you all for being with us today. I would like to ask Strom Thurmond if he has any opening remarks.

OPENING STATEMENT OF SENATOR THURMOND

Senator **Thurmond**. Thank you, Mr. Chairman. It is a pleasure to be here today to receive testimony on S. 11, the Veterans' Administration Adjudication Procedure and Judicial Review Act, and S. 2292, the Veterans' Judicial Review Act.

Both of these measures are worthy of our careful consideration. Mr. Chairman, at this time, I want to commend you and Senator Simpson and Senator Murkowski, the current minority member, for all of your efforts on this most important issue.

Mr. Chairman, as each member is keenly aware, judicial review of veterans' disability decisions has been considered several times by the Senate in the past 2 years, beginning with the 94th Congress. On four different occasions, this committee has reported judicial review legislation, and on four occasions, the full Senate has approved judicial review legislation.

The most recent Senate action took place in July 1985. Despite passage in this body, our House colleagues have maintained a different position on this matter. I do, however, respect their opinion.

I have previously supported limited judicial review, and I continue to believe that some form of review of final VA determinations is needed. In the past, I have expressed my concern that, if we are to have judicial review, the scope of review of questions of fact should be narrow.

The bills passed by the Senate in 1981, 1983, and 1985 all included narrow scope of review provisions, as does the current legislation before this committee. Providing a narrow scope of review will assist in ensuring that the court will not simply substitute its judgment on questions of fact for that of the Board of Veterans' Appeals.

Mr. Chairman, I recognize that there is a diversity of opinion on this issue; and I fully appreciate the reasons for these different views. I especially appreciate knowing the views of the veterans' service organizations who have long been involved in helping veterans prepare their disability claims.

I intend to carefully review all the testimony, and I am sure it will be most helpful as this committee attempts to objectively address this matter. Mr. Chairman, I have another meeting, and I hope to get back. If not, I will read this testimony.

Chairman CRANSTON. Thank you very much. Now, Susan Bennett, may we start with you?

STATEMENT OF SUSAN D. BENNETT, ESQ., ASSISTANT PROFESSOR OF LAW AND DIRECTOR, PUBLIC INTEREST LAW CLINIC, WASHINGTON COLLEGE OF LAW, AMERICAN UNIVERSITY, WASHINGTON, D.C.

Ms. BENNETT. Thank you. Mr. Chairman and Senator Murkowski, my name is Susan Bennett. To my right is Marilyn Jones, a second-year law student at the Washington College of Law, who has assisted in the preparation of our written submission to you.

Since 1984, I have served as Director of the Public Interest Law Clinic at the Washington College of Law. This is a legal services clinic funded by the law school, which was founded some 8 years ago. Since its inception, the clinic has served one major function, to represent veterans before the Board of Veterans' Appeals and the VA regional offices.

Not many other attorneys can do what we do. This is primarily because, as you know, current law precludes any payment for attorneys' services; and as I will point out later in my submission, these cases, even through the administrative level, require sophisticated and trained legal effort and a great deal of expenditure of time.

As a major part of our work, we have advocated the cases of many veterans before the Board of Veterans' Appeals. What we have seen in the course of the representation, the many hundreds of clients who have sought our assistance, has convinced us of the absolute necessity of giving veterans the same right already accorded to other recipients of Federal benefits, the right to have some court review final adverse agency determination of claimants' claims.

We support S. 11 in its attempt to afford some sort of judicial review. I will explain briefly why we are persuaded that judicial review will benefit our clients and will also serve to effect needed reforms in the VA adjudicative system.

Judicial review will demand and will induce fair decisions that can be reviewed, decisions in which findings of fact are accurate and in which choices of fact are explained. These elements are now missing from many of the decisions we see in our clients' case.

For example, the Board of Veterans' Appeals rarely explains why it will rest its decisions on two, 5- or 6-year-old diagnoses by VA doctors and either or summarily reject three or four more recent diagnoses by other VA physicians or by the claimant's treating physician.

The only guiding principle for the selection of evidence seems to be that, when an approximate balance of positive and negative evidence exists, the BVA will choose that evidence which allows it to decide the claim against the veteran. The reasonable doubt doctrine, from which I have just quoted, is only applied it seems when the overwhelming weight of evidence, in fact, supports the veteran's claim.

This is clearly not the intent behind the current formulation of the doctrine in the regulations or behind the revised version proposed in S. 11.

In short, the BVA's choice of evidence from the record often seems arbitrary and capricious, without explanation and without any rational application to the law, problems which S. 11 addresses correctly and I believe would serve to correct.

Both in its judicial review provisions and in its change to the $10 limit on attorneys' fees, S. 11 acknowledges and confronts a basic paradox in the VA system. Despite professions of informality and nonadversariality, the VA system is highly adversarial. It is loaded with lawyers on one side, and it is filled with pitfalls for the unrepresented claimant on the other side. We have, for example, had several clients who were unrepresented at the local level and whose claims have been dismissed by the Board of Veterans' Appeals for the clients' failures to use particular forms or certain magic words or forms of pleading.

These dismissals have cost our clients many months of time and potentially many thousands of dollars in lost compensation. These dismissals are arbitrary; they contravene the BVA's duty to honor the claimant's wishes and intentions and to explore the record fully.

These dismissals also represent unlawful withholding of agency action of the sort that S. 11 would redress. S. 11 would provide the veteran meaningful relief in these cases.

Where the VA's regulations sanction this kind of formalism, which they often do, the assistance of lawyers is crucial. The one aspect of S. 2292 which we do support as preferable to the comparable section in S. 11 eliminates the $10 limit for cases at the point after which the VA regional office issues its statement of the case.

This provision would allow attorneys to be compensated for the many hours which representation of a case before BVA can take, hours spent in additional development of the record, review of the BVA index, preparation of a hearing brief, witness preparation, and oral argument. Judicial review, of course, would require and rightly so a fuller development and exploration of the record than attorneys currently would be able to provide, given the $10 limitation on the fees.

Members of the committee, our written submission explains these points and gives specific answers in greater detail. We ask that you refer to it.

We believe that S. 11 would compel the BVA to render that accountability to the record and to the law that veterans deserve; and for that reason, we give it our support. Thank you for your attention.

Chairman CRANSTON. Thank you very much, and thanks for heeding the 5-minute warning.

[The prepared statement of Ms. Bennett appears on p. 127.]

Chairman CRANSTON. Now, I want to go to Alan Simpson.

OPENING STATEMENT OF SENATOR SIMPSON

Senator SIMPSON. Mr. Chairman, you are very kind. I thank you. I have another engagement, and I appreciate this. I look forward to reviewing the testimony of the groups who are appearing here today.

As you know, Mr. Chairman—and you have been very helpful to me and the ranking member has, too—I have always been a firm supporter of this kind of legislation, to grant judicial review to veterans.

I really can see no absolutely rational reason why veterans alone should have no access to Federal courts when they feel that the VA has improperly denied a claim for benefits. I don't take any second seat in support of veterans; I remain insistent upon a recognition of fiscal reality and priorities of service-connected versus nonservice-connected, and you have heard me comment on that from time to time.

But other recipients of Federal benefits have access to Federal courts to challenge claim denials, and it is really an issue of fundamental fairness to me, Mr. Chairman, that we permit veterans the same access.

I have been on this legislation four times and have recognized the importance of it in the Senate. We passed the legislation to permit judicial review and lift the $10 attorney fee limitation, and

I don't come into this representing attorneys. I think we have to be very careful that we do limit that compensation in any kind of bill we do.

But it is absurd, and it has been absurd; and I am an original cosponsor and always have been. The thing I guess I want to comment on—and I won't be overly long at all—is that I find it most interesting that the VA has justified its position of opposition to judicial review on the basis that the system of reviewing claims would be rendered adversarial if judicial review were permitted.

It goes on to say it objects to documenting the factors and considerations which lead to denial. I trust that that doesn't indicate that the VA does not fully and completely document its reasons for denying claims. It says it objects to having to document the factors and considerations which lead to denial of claims.

I surely fail to see how the VA can claim to be adequately or fairly giving our deserving veterans a fair hearing or the benefits that are due them with that kind of a statement. They object to judicial review in district courts because "in district courts, it will result in inconsistent case law and geographically based decisions."

I find that quite ludicrous in light of the VA program evaluation which I learned of and was cited by Senator Glenn in recent hearings on elevation of the VA to Cabinet status in which the VA rating boards were given identical cases and asked to rate service-connected disabilities.

One case of post-traumatic stress disorder—this was one case—the facts were all the same, 16 rating boards rated the disability at 10 percent, 19 boards rated the disability at 30 percent, 13 rated the disability at 50 percent, and one rated the disability at 70 percent. Now, if that isn't inconsistent, I don't know what is.

A court system could never get that inconsistent.

And I guess I find it objectionable to say that this is a veterans' issue, that the VA testimony characterizes this as a veterans' issue and goes on to say that those who champion judicial review represent a miniscule segment of the veteran population. There is much evidence to the contrary of that, Mr. Chairman.

If the VA service organizations that are provided free VA office space and equipment are satisfied with the way the current system operates, I guess that appears to be enough for the VA. I don't think it is enough for veterans, whether they have a voice with the national service organizations or not.

You know my view on that. I have long held that the professional veterans that one finds lobbying this august body may not always be speaking for most of the veterans in this country; and I don't make that statement merely on the basis of some gut feeling, but on the basis of conversations I have with veterans in my home State of Wyoming and the correspondence I have with veterans across the country.

So, Mr. Chairman, I would caution the VA not to assume that the only legitimate voice for veterans is to be found in the Disabled American Veterans or the Veterans of Foreign Wars or The American Legion, the latter two of which claim me as a member; and I can assure you that they do not always speak for me.

Now, they do speak at me at times——[Laughter.]

But they don't speak for me. I do look forward to reviewing the testimony regarding Senator Murkowski's proposal, although I confess that my initial reaction to that measure is that it does not provide judicial review in the most meaningful sense and that it does not permit review of individual benefit determinations. I think it is not quite strong enough.

So, my actions in support of this issue are long standing; and here is one where the VA and the service organizations, I think, have chosen to cozy up in order to preserve an old and unresponsive system and that all the hometown veteran gets is short shrift.

This is not a ploy on my part to do in the Cabinet status for the VA, but this is my biennial search for some real justice for veterans. The big three ask often, always for more money and more service; and when the average veteran asks for justice, they try to deny it of him or her. I hope we have an opportunity to change that, and here is a way to do it.

I thank you, Mr. Chairman.

Chairman CRANSTON. Thank you, Alan, and thank you for your steadfast leadership on this issue over many years and for your very powerful and meaningful support of this legislation.

Senator SIMPSON. Thank you, Mr. Chairman.

Senator MURKOWSKI. If I may, Mr. Chairman, I don't believe that Senator Simpson was present when I made my opening statement. I would make just a very brief reference to the objective of my bill.

As Senator Simpson indicated, this type of legislation has been before the committee about four times, and hasn't gone anywhere. And you, as former ranking member of the committee, were a party to those efforts, those well-meaning efforts. The purpose of the compromise which my bill represents is based primarily on the fact that, under the current system, veterans really don't have the opportunity to challenge regulations that at one time or another may affect them in a manner which would truly necessitate or should necessitate some type of judicial relief requiring representation by counsel. My bill deals with that problem, as opposed to just opening the door to the other extreme, which would provide any veteran who didn't like the manner in which a factual claim was decided to proceed by having counsel represent him. I am fearful, Senator, that the latter approach might lead to the VA having to pay the attorneys' fees.

As we know, as we try and develop these programs and make them workable, everything is a compromise; and I think that is what we have here. And that is the effort that the Senator from Alaska was making in trying to address, first of all, the opportunity to litigate the validity of regulations with representation by counsel. The other extreme is to open up the door to purely factual disputes.

I appreciate your concerns; but I wanted to cite very clearly where we were attempting to come in with this bill.

Senator SIMPSON. Mr. Chairman and Frank, too, I do hear that; and I think this could be a real bank-buster if you get into this area where there is access from the Federal Treasury for attorneys' fees without serious limitations. I do understand that, but we can do better than $10, I have a hunch.

Senator **Murkowski**. I agree. On many of the contracts that are signed between industry and labor, attorneys' fees are provided for under the contract terms; and I think we both agree that isn't what we are looking for here. We are not looking for the Federal Government to underwrite the possible attorneys' fees that might be generated in the litigation of factual disputes.

Senator **Simpson**. I will be very interested to see what you and the chairman put together after these hearings. I think very possibly it will be very close to where you want to be.

Senator **Murkowski**. There won't be too much sausage. [Laughter.]

Senator **Simpson**. Well, there will be, without question, sausage—that is the way our work is; but occasionally, we find a ruby in the dung, and that is what keeps us going. [Laughter.]

Thank you.

Chairman **Cranston**. Thank you, gentlemen. Mr. Fidell, I appreciate your patience. We will now go to your statement.

STATEMENT OF EUGENE R. FIDELL, PARTNER, KLORES, FELDESMAN & TUCKER, WASHINGTON, DC

Mr. **Fidell**. Not at all, Mr. Chairman. May I say, since I may have to beat a hasty retreat, that I have an appointment at the Court of Appeals at 10 a.m. So, if you don't mind, I may slide out, although I would much prefer to stay for the whole hearing.

Chairman **Cranston**. Let me add that we have all those same problems here. That is why the two Senators left. I have to leave at some point. I have two other places I am supposed to be, and we are going to be rotating around here. In my absence, Jon Steinberg may have to handle some of the questioning that I would like to do; but we all have those problems.

Mr. **Fidell**. With that preparatory note in mind, let's look for the ruby.

Chairman **Cranston**. Fine.

Mr. **Fidell**. First, let me say that, having followed this controversy from something of a distance for a number of years, it seems to me an overall comment should be made.

We have what I think is an embarrassment of riches in terms of the veterans' service organizations. Although this is an area with which the committee is very familiar and the beneficiaries of the organizations are likely to be familiar with it, the fact of the matter is that, to the country at large, the role played by the service organizations is not that well known.

And I think it is important to note that how the Congress deals with these issues should not be viewed in any way as a reflection on the effectiveness or the goals and means applied by the service organizations. They have done a whale of a job for a lot of people, and they are largely unsung.

Having said that, let me comment very briefly on S. 11 in the interest of time and then move on for a minute to Senator Murkowski's bill.

S. 11 strikes me as, on the whole, a sensible approach to this problem. Obviously, as you can see from my prepared statement, it is my sense that the vindication of veterans' rights in these important areas ought to have the same procedural trappings that we associate with the vindication of any other important legal rights in our society.

If a beneficiary of the Social Security program, for example, can have counsel throughout the processing of the claim, so, too, I would think that a veteran ought to have the right to counsel.

Similarly, to the extent that you can take a Social Security claim to a district court, I don't understand why there is a distinction to be drawn as soon as veterans come into the picture.

And if I may comment on one of the observations that one of your colleagues made just now, if veterans are a special class—I think for some purposes they are and should be viewed as such—it would seem to be that they deserve more rather than less by way of procedural protection.

When you look at the norm of the rights that people have in this country for the vindication of their interests, it is obvious that the current arrangements—ancient though they may be—are out of step with the way our society handles so many other important matters. They ought to be brought into step.

Now, this is to some extent inspired by Mr. Murkowski's bill, and I am sorry that he isn't here, but I know that Mr. Principi is here; and I am anxious to have some dialogue, if at all possible.

I am concerned that any provision—and I guess this applies to S. 11 as well—restricts either directly or through the fee mechanism access to counsel at the early stages of a case. Oftentimes, the most critical decisions in a case get made early on, and by the time lawyers get involved later in the process, it may be too late. The evidence may be gone; the experts may no longer be available.

The strategic planning that has to be done in a case may be futile. Waivers may have occurred at one time or another; and sympathetic though the BVA may prove to be, or the reviewing court may prove to be, I am concerned that in a given case the inability of an individual to have an attorney's advice at the earliest stages of the process—not that it is going to happen in every case—it certainly is not going to happen in every case—but the opportunity to have it might prove to be counterproductive for vindication of the individual's own rights. It also might disadvantage the agency in terms of developing the kind of record that it needs to make an intelligent decision, not to mention the kind of record that the reviewing court needs for it to exercise its functions in a proper fashion.

Now, with regard to the proposal in Mr. Murkowski's bill, I was concerned that, by focusing on the rulemaking process, rather than the adjudicatory process, it might put the courts in a position in which they are less able to perform the reviewing function that we ordinarily have in mind for them.

Let me be specific as to what that means. If the case goes up only on review of a rule, a couple of things are going to happen.

If you provide for judicial review only for rulemaking, what is going to happen is people are going to go through all kinds of contortions to paint other kinds of controversies as if they were controversies over rulemaking. That is number one.

Number two, if it is applied literally as involving just the rule and not the facts of the case, that means that the courts of appeals are going to be presented with almost a duty to provide advisory opinions, liberated from the kind of factual record that I always thought you needed in order to perform the judicial review function intelligently.

That is, I think, my greatest concern about focusing only on rules for purposes of judicial review. Let me stop there. If there are any questions, I would be happy to respond to them.

I applaud the committee for trying to grapple with these issues. It is obvious that there is interaction going on, and I hope something good comes out of it.

[The prepared statement of Mr. Fidell appears on p. 158.]

Chairman CRANSTON. Thank you. Since you have to leave, I would like to ask you a few questions before going to the other panelists.

Mr. FIDELL. Please.

Chairman CRANSTON. Mr. Rosenberg's testimony raises a concern that, like the development of case law on the Board for Correction of Military Records, judicial review of veterans' adverse benefit determination would produce a body of case law that would be unfavorable to the veteran, including the use by the VA of defenses such as laches and the statute of limitations.

Based on your experience before the Board for Corrections, what has been the impact of the availability of judicial review? And let me ask you to please respond very briefly and expand in writing if you want to say more.

Mr. FIDELL. Judicial review has been available, as I understand it, from the very beginning of the corrections process. It was expanded somewhat when section 1491 was amended; but the effect of judicial review has been, in my view, to improve the process of decisionmaking at the corrections boards.

They do a more careful job, I think, and the danger that they are going to wrongly or inappropriately invoke judicial concepts such as laches, I think is overstated. My experience teaches that that is not a real dangers.

Chairman CRANSTON. In your opinion, what are the benefits to the Board for Corrections of having judicial review of its decisions?

Mr. FIDELL. It keeps them on their toes—that is number one—every time somebody takes the corrections board to court. I have had to do it once or twice—not very often, by the way. I have done a lot of corrections-board cases, and I have almost never had to go to court.

But every case that anybody does take to court has a chastening effect. It is a useful reminder to the corrections boards in all the other cases pending that somebody is potentially looking over their shoulder, and they may be held accountable for a mistaken decision.

So, I think it has had a wonderful effect; and I must say I have never sensed any resentment on the part of the corrections boards when I have had to take them to court.

Chairman CRANSTON. As you read and understand S. 11, do you share Mr. Rosenberg's concerns about defenses which have arisen in the corrections board arena being adopted in the review of veterans' cases and having a negative impact?

Mr. FIDELL. No.

Chairman CRANSTON. Before the Board for Corrections of Military Records, as with the proceedings before the VA, do not both attorneys and veterans' service organizations officers represent veterans and is not the veteran accorded the benefit of the doubt?

Mr. FIDELL. That is my understanding, and I think the veteran would have the best of all possible worlds if this additional right were made available in a meaningful fashion.

Chairman CRANSTON. Do you believe the presence of lawyers before the Board has made the presentation of veterans' cases more adversarial?

Mr. FIDELL. You mean before the corrections boards?

Chairman CRANSTON. Yes.

Mr. FIDELL. Well, I suppose that to some extent things inevitably take on a slightly more adversarial character; but you know, the word "adversarial" is not a dirty word.

We lawyers are proud of the adversary system. We think it provides a crucible in which the competing interests can be reconciled and the facts brought out in greater clarity because of the interplay of those competing interests.

I think the adversarial process is a good one rather than a bad one, but I am not suggesting the adversarial process. I am simply saying that a lawyer can perform a role in marshaling the evidence without altering the essential nonadversarial nature of the function.

Chairman CRANSTON. Do you believe the presence of lawyers before the Board has had a negative effect on the benefit-of-the-doubt standard?

Mr. FIDELL. No.

Chairman CRANSTON. Mr. Rosenberg's testimony also states that he believes that the Federal judiciary is ill-equipped and ill-suited to perform judicial review of adverse VA benefit determination. Would you comment on that opinion?

Mr. FIDELL. I disagree with that. Let me say that no one should have any illusions about the number of BVA cases that are going to be reversed on judicial review, once judicial review is in place.

In 5 years or so, this committee could usefully have another hearing and look at the statistics and see just how many cases get reversed. I suggest to you that, based on the available evidence, the Federal courts are not going to be overturning the BVA right and left.

There is a substantial degree of deference to official agency decisionmaking. The standard of review will be a relatively narrow one. I just don't think you have to be concerned about the BVA's job being taken over by the Federal courts because Federal judges are not going to do it.

Chairman CRANSTON. The DAV's testimony suggests that the attorney fee limitation should not be lifted because "it may well result in lawyers creaming off the easy cases because contingent fees are more likely to be realized and declining to work on the hard ones because obtaining payment would be less likely."

Given the structure of permissible fees under S. 11, what are your views on that issue?

Mr. FIDELL. I get lost in that proposition. I just don't see that lawyers would be creaming off the top of the "soup" here, so to speak; and let me also add that the fact that a lawyer is willing to become involved, let's say, on a contingent basis in a piece of litigation, is some sign that the case is a meritorious case.

I get lost in the logic of that assertion.

Chairman CRANSTON. Thank you. Given the structure of permissible fees under S. 11 and your experience, do you anticipate a large number of attorneys seeking to represent veterans in VA claims?

Mr. FIDELL. Oh my, no. Believe me, this is not an area that is going to see a litigation explosion. This is an arcane area; it is going to continue to be an arcane area. The "pot of gold" will not be at the end of this rainbow, and you are not going to see lawyers rushing to become VA mavens. It is just not going to happen.

Chairman CRANSTON. Thank you very much.

Mr. FIDELL. Thank you, Senator. If you don't mind, I will have to leave now.

Chairman CRANSTON. I understand.

Mr. Rosenberg?

STATEMENT OF KEITH A. ROSENBERG, ESQ., WHITEFORD, TAYLOR & PRESTON

Mr. ROSENBERG. Thank you, Senator Cranston. It is a pleasure to be here today because I have had a continuing interest in the question of judicial review of veterans' benefit cases, as well as the question of attorneys' fees; and I previously testified before the House of Representatives in 1986 on H.R. 585.

I have carefully set out the reasons why I don't have a great deal of support for S. 11 and why I do have more support for S. 2292 in my submitted comments.

I don't think the question any more is whether or not there is going to be judicial review; I think it is really getting down to a question of what kind of judicial review there is going to be and whether or not the Congress of the United States is going to reach some compromise that will afford some avenue of judicial review to veterans' claims.

I am more confident and pleased with the question of challenging the validity of regulations as proposed in S. 2292 because, contrary to the view expressed by Mr. Fidell, whom I have known for a long time, I will send to you for the record an opinion from the Army Board for Correction of Military Records in a meritorious that I will redact out the name and other pertinent information to ensure the confidentiality of the client, which clearly demonstrates to me that the Army Board in particular—although I will say not the Navy and not quite yet the Air Force—has taken a position that it will use defenses which have been molded and litigated, particularly in the United States Claims Court and in the U.S. Court of Appeals for the Federal Circuit, to deny veterans service members otherwise meritorious claims before the corrections board.

These doctrines are the doctrines of laches and application of the statute of limitations. And I will share those with you and send them to you so you can see them in the record.

[Subsequently, Mr. Rosenberg furnished the information which appears on p. 630.]

Mr. **Rosenberg**. I doubt very seriously whether or not ingenious U.S. attorneys in the various districts in these United States will not similarly attempt to use such defenses against veterans and otherwise meritorious claims.

For that reason and for other reasons which I have articulated, I do not endorse the concept of challenging benefit determination cases.

I also correspondingly would suggest that there are several major issues, if not hundreds of regulations, which come out of the Veterans' Administration every year which have a very significant impact on the rights and benefits of veterans. I would recall, for example, in 1986 when the Office of the General Counsel of the Veterans' Administration promulgated a regulation which denied the right of fee basis card recipients to appeal to the Board of Veterans' Appeals, thereby terminating their right to any type of meaningful review at the Department of Medicine and Surgery.

This affected a number of veterans and a significant amount of monetary benefits that they otherwise would receive, and this is the type of issue that I believe that S. 2292 would address.

Finally, with respect to attorneys' fees, I find an anomaly in S. 11 which I find very difficult to deal with, and I don't have an answer for it. That anomaly is this:

If the case is remanded and if you present new, additional and material evidence, it appears that the law would allow you to be represented by an attorney for a fee; but it wouldn't allow you to be represented before the BVA in the first instance for fee of more than $10. I find that somewhat conflicting and disturbing.

If you are going to invite attorneys to represent claimants before the Veterans' Administration, you should do that in the first instance and not allow them to get through the living room by going through the kitchen door, instead of being able to go through the front door and through the foyer.

My time has expired. I would be more than happy to answer any questions since I have a feeling that I am in the "cat bird" seat; and I will do my best to respond. Thank you very much.

Chairman **Cranston**. I do have some questions for you.

[The prepared statement of Mr. Rosenberg appears on p. 164.]

Chairman **Cranston**. In your written testimony, you state that S. 2292 compromises the need for judicial review with the perils of turning the BVA into an adversarial system. Do I understand your opinion correctly that S. 2292 would lessen the possibility of turning the BVA into an adversarial system?

Mr. **Rosenberg**. Yes, sir.

Chairman **Cranston**. Do you agree that there is nothing in S. 2292 that would stop an attorney representing the claimant before the BVA on a challenge to VA regulations from simply working pro bono in advocating the facts?

Mr. **Rosenberg**. No, sir. I have done it myself many times.

Chairman **Cranston**. If you believe the appearance of attorneys before the BVA would make the BVA into an adversarial system, which from your testimony you do, how can the appearance of the attorney at an earlier stage in the proceedings, as provided for S. 2292, make an adversarial system less likely than under S. 11, which requires a final BVA decision before the claimant can pay for an attorney?

Mr. ROSENBERG. The question here, Senator, is one of degree. I can't answer the question other than to give you a gut reaction. It is getting down to a question of a policy determination.

Do we want to invite attorneys into the system in a manner in which we will have more and more attorneys? Or do we want to restrict it only to certain issues? Legal issues are more susceptible to attorneys being able to be of assistance. There are those who argue that the factual determination should be subject to the assistance of an attorney so that he can be of greater assistance in putting the case together at the outset.

I don't necessarily say that either one of those is right or wrong, but I am saying that you are either going to do it all, or you are going to do it part way; and whatever way you are going to do it, you are going to create some degree of adversarial nature to the system and make the BVA defensive. It is going to become defensive, and it is going to have an advocate for itself to defend its own regulations.

This is a policy decision. Unfortunately, I look at it from a litigation point of view. I don't necessarily agree that the corrections boards are as friendly and as receptive as they were 15 years ago when I started doing this.

They have very rigorously staffed their opinions. They are very rigorous both from the point of referring cases to the Judge Advocate General's Office for opinions, as well as to administrative sections within the various service departments; and they create a very good record for their positions, and courts are not being very receptive in reviewing corrections board decisions.

I don't have statistics, but there are fewer and fewer cases being filed because there is less and less likelihood of result of prevailing.

Chairman CRANSTON. Because of our time constraints, I do want to ask you to try to be as brief as possible in your responses. I do also want to ask Jon Steinberg, committee chief counsel, to follow-up on that question.

Mr. STEINBERG. Mr. Rosenberg, the point of the question that the chairman raised with you was to compare the situation under S. 11 and under S. 2292 and to focus on the possibility, as he raised in an earlier question, that once the attorney is before the Board to raise a question of law—for which he can be compensated—it is fully open to him to argue the factual issues on a pro bono basis.

You yourself said there would be nothing preventing the attorney from doing it, and you have done it yourself on a number of occasions.

That being the case, since that appearance and argument would take place before the BVA had even rendered an initial decision, the question was: Would not that raise more of the adversarial concerns that you are concerned about than the appearance only after the initial BVA decision had been rendered, as S. 11 would permit?

Mr. ROSENBERG. No. The answer is no. If you want me to explain a little bit, I would be brief.

Chairman CRANSTON. How about explaining in writing?

Mr. ROSENBERG. Surely.

[Subsequently, Mr. Rosenberg furnished the information which appears on p. 626.]

Chairman **Cranston**. I would like to interrupt and call Senator John Kerry to the table. Would the panel please stay here because we have more questions?

The Senator has time constraints, as do all of us; so I want to give him an opportunity to testify. I welcome you, John.

STATEMENT OF HON. JOHN F. KERRY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator **Kerry**. Mr. Chairman, thank you very, very much. I appreciate the panel being willing to let me slide in like this.

Mr. Chairman, I appreciate the opportunity to come here and to testify before this committee, and I am particularly appreciative and grateful for your leadership in this area and in so many areas with veterans over the years.

I can remember back in 1971, when I first came to Washington as a veteran seeking someone to list, you were the first; and you really did listen and you responded. And you have always done that, and we are all very appreciative of that.

Chairman **Cranston**. Thank you.

Senator **Kerry**. I am also pleased to join with you as a cosponsor of S. 11, and I support this legislation for a number of different reasons. Mr. Chairman, it seems to me that one of the most fundamental rights that we have in this country, in fact a right that so clearly distinguishes us from every other people on the face of this planet, is the right to get a full hearing of any kind of grievance that we as individual citizens have.

We have always prided ourselves in the fact that we set up a separate, distinguishable review system for the process of doing that. The founding fathers did that by setting it up as a whole separate branch of Government in order to guarantee that neither the executive nor the legislative branches could infringe on the rights of people.

There is only one class of Americans who don't get the full benefit of that independent—totally independent—review. If you are a prisoner in jail, you get the right to go to Federal court for review of decisions that affect your life. If you are mentally ill, you get the right to representation to go to Federal court to have somebody decide whether or not you have been fairly dealt with. If you are an illegal alien, not yet even a full citizen—certainly not one who has fought for country or served or donned a uniform—you get the right to go to Federal court and have someone decide whether or not you have been independently and fairly dealt with.

Veterans—veterans—are the only class of people in the United States of America who don't have the right to get that kind of independent review. Sure, they can go to a board of appeals. Sure, they have a means of going through the veteran system.

But the question is: If there has been proven to be, or there is even a feeling that, there is something less than independence or something less than impartiality in that process, there is no final review process by which these people who have served their country have the ability to be able to get that kind of review.

Now, a poll recently completed by the Cambridge Survey Research, which is a well-known research company—it used to be owned by Pat Cadell; it has done polling for 25 years in this country—showed that veterans throughout the United States support the right of judicial review by a 3 to 1 margin.

They believe the present system should be changed, and that cuts across all demographic and all attitudinal groups.

To say that they don't want it simply doesn't represent what the average veteran out there across this country feels.

Rather than go on about the philosophical aspects of this, let me show you two reasons, Mr. Chairman, if I may, two case histories about why this is important; and they both involve Massachusetts veterans.

Walter Norton is a 40-year-old Vietnam veteran, and he lives in Boston. He is a personal friend of mine. He is a Marine Corps veteran, served in Vietnam, served in combat. His experiences in Vietnam, in the words of his psychiatrist at the VA Outpatient Clinic in Boston, included—and incidentally, he has given us permission to release private, confidential psychiatric statements—said:

> At least witnessed as many atrocities and the bagging of bodies—of dead bodies—as anyone, living through the kinds of experiences most commonly associated with PTSD, or post-traumatic-stress disorder.

Mr. Norton has applied, Mr. Chairman, for 100 percent disability to the Veterans' Administration due to his inability to work, caused by this condition. He currently is at 60 percent. He has been treated by several psychiatrists in Massachusetts, all of whom have found him to be disabled and unemployable.

Nevertheless, his claim has been repeatedly denied by the Veterans' Administration. A psychiatrist who examined Mr. Norton for the VA named Edmond Kuderaskus wrote in his file, and I quote:

> Dr. Johnson—this is a previous psychiatrist—detailed his work with Mr. Norton and told me of Mr. Norton's unsuccessful attempts to return to school at the University of Massachusetts in Boston. He seemed highly motivated at the time, but realized it would be difficult to go back.
>
> He discussed at length with Dr. Johnson his curriculum and his hopes for the future, tried to attend a few classes; but because of the development of agrophobia and claustrophobia, which put him into panic states, either before leaving school, but especially in the subway, he was unable to be at his classes on time.
>
> In order to help the veteran attend school, Dr. Johnson increased his medication of Alprozolan for his severe anxiety and his sleeplessness and Flexoral for the grinding of his teeth, his bruxism. However, the amount of medication necessary to control his panic states and his phobias so drugged him that he was unable to function in school, and at that point he had to withdraw.

Mr. Norton then went to another psychiatrist who specialized in post-traumatic-stress disorder, Dr. Richard Owings. The file indicates:

> He was working with Mr. Norton in an attempt to work through his survival guilt, sense of victimization, terrifying reminiscences, and how his post-traumatic-stress disorder status functions, with his underlying character to solve like problems in a less than satisfying way.

Dr. Owings wrote to the VA:

> I have reviewed his record and have seen Dr. Kuderaskus' and Dr. Johnson's letters in support of his claim. I concur with their assessment of the symptoms, the suffering they have caused him and his unemployability.

Dr. Kuderaskus wrote:

> Mr. Norton is an extremely desperate man. He sees his current therapy and his attempt to reconstruct himself with the help of professionals as his last chance. He is unable to work because of the extreme anger that he has to deal with, the alienation, the stressful preoccupation with his symptomology and the all-consuming nature of his treatment.
>
> The patient is anxious, tense, brooding, preoccupied with the same flashbacks and nightmares that he had been experiencing at his prior examination. He shows, in addition, phobias, panic states, and extreme depression. He is isolated, alienated, withdrawn and emotionally blunting.
>
> His judgment is compromised by the intensity of his symptomology. His inability to concentrate and his distractibility have been a problem in his studies. That and his explosive anger have prevented him from working and causes him to withdraw further.
>
> His immediate prognosis is poor. His long-term prognosis is guarded, but hopeful.

Mr. Norton's psychiatrist at the VA Outpatient Clinic in Boston, Dr. Charles Johnson, the Assistant Chief of Psychiatric Service, wrote to the VA:

> In my carefully considered opinion, this man is dealing with psychological emotional scars incurred during his service in Vietnam. I cannot understand why he is now denied a service-connected disability for this condition. There is something seriously wrong with a country which treats its combat veterans this way.

Now, Mr. Chairman, last Christmas Walter Norton was really on the verge of committing suicide, and he was dead broke. I and people in my office took up a collection to try to get enough money to pay his bills and tide him over. Now, I think it is disgraceful that this guy has no redress.

I just find it hard to believe that he doesn't have an opportunity to get independent review of this case.

Let me describe one other veteran, a shorter story. This is a veteran of World War II. His name is Francis Scardino from East Dedham, MA.

He served on active duty from January 1944 to December 1945. He was a prisoner of war from January 9 to May 10, 1945. Since 1945, Mr. Scardino has suffered from sleep problems, edema, arthritis, tendinitis, and dysentery. He worked for 19 years as an auditor with the Massachusetts Department of the Revenue, from May 1966 to November 1985.

In March of 1985, he became too disabled to work full time. He was forced to retire from his job, 5 years premature, because of his mental and physical problems. After his retirement, he tried to work as a part-time national service officer for a prisoner of war organization, but he had to resign because of his service-connected mental and physical disabilities.

He has sought the same kind of redress as Walter Norton has. He was found by the Massachusetts Board of Retirement to be permanently and totally disabled because of these problems that he has from the war.

In October, a Veterans' Administration staff physician reported that he had examined him and found him to be completely and permanently disabled due to those same matters. In February of 1986, he was examined by a board of three physicians for the purpose of State disability retirement; they found that he was no longer capable of performing his duties because of his disabilities, and they recommended permanent retirement.

He applied to the Board of Veterans' Appeals for that entitlement, and he was denied.

Now, Mr. Chairman, again here is a group of people. Now, when I hear people say, well, you know we don't want to create an adversarial relationship—therefore, we really don't want to change the status quo—I don't know how you can get more adversarial than it is for the people who need help.

They don't view the VA or the process as anything except adversarial at this point in time. It seems to me that you have World War II veterans, you have Korean veterans, you have Vietnam veterans, and peacetime service veterans, all of whom I think have reason to be able to ask for this process of review.

Now, just to move faster—I know your time is short here—the Carter administration came out for judicial review. The Senate has passed it four times. It seems to me that, when you look at the fact that last year the Veterans' Administration sued over 40,000 veterans and took them to Federal court to recover money that they felt they were owed by veterans, and yet veterans don't have the right to turn around and go to Federal court to get money they think they are owed by the VA, something is absolutely out of whack here.

I think if you look at the total costs and what is contained in S. 11, you have a structure where you will have a Board of Appeals through the presumptive process that, with the judicial review hanging there, will probably be more responsive, will reduce the number of cases that might in fact finally go to that kind of review.

And if, in fact, the argument holds that this is going to be terribly expensive, that is kind of an admission that once you open it up to review, the review process is going to find and redress a lot of grievances and say that, indeed, we ought to be paying these people and they should be rightfully be paid.

If that is what ought to happen because of an independent analysis by the courts of this country, then, Mr. Chairman, that is what ought to happen.

This is a hangup from the Civil War period. That is when this was put in place. It is anachronistic, the notion that only $10 of lawyers' fees will be paid and the notion that this is to protect veterans.

That period is long since gone. Your bill, Mr. Chairman, restricts lawyers' fees; it sets up a very fine structure for this process of review, and I can't for the life of me understand why certain groups oppose something as fundamental as allowing people who have served their country to have an independent review of their cases.

I hope the Senate is going to move forward on this matter this year. You know, I support the idea of a Cabinet officer being a veteran; but I have to tell you that, to me, that is the easiest of things and, frankly, not the most meaningful.

The notion that veterans in this country have to have someone in the Cabinet in order to get what they want, but they can't get what they really want—which is Agent Orange redress, and judicial review—is somehow a continuation of this process of misguided priorities.

Now, I will vote for it, and I support it; but I would like to see something far more substantive. Veterans have clout beyond most groups in this Nation, and I am proud of that; and it ought to be that way, and I am glad to be one of those who hopefully adds to that clout.

But let's see it really produce something of meaning, and I hope we are going to do that with judicial review.

Mr. Chairman, I really appreciate your time. Thank you.

Chairman CRANSTON. Thank you. I thank you for that eloquent, forceful, well-reasoned testimony. Those two examples you gave are classics.

Senator KERRY. Thank you very, very much.

[The prepared statement of Senator Kerry appears on p. 170.]

Chairman CRANSTON. Because of the time constraints, Mr. Rosenberg and Ms. Bennett, I am not going to ask any further questions. We will submit some in writing for the record, but I would like to ask you, Susan Bennett, if you have any comments to make on the questions I have already posed, and the answers are brief, we will hear them now.

Ms. BENNETT. I have no further comments, Mr. Chairman.

Chairman CRANSTON. Thank you all very, very much. You will be hearing from us in writing.

Now, I would like to welcome Philip Riggin, Director of the National Legislative Commission of The American Legion; James Magill, Director of the National Legislative Service, Veterans of Foreign Wars; John Heilman, National Legislative Director, Disabled American Veterans, accompanied by Joseph Zengerle, Esquire; R. Jack Powell, Executive Director, Paralyzed Veterans of America; and Richard O'Dell, Vice President, Vietnam Veterans of America, accompanied by Paul S. Egan, Legislative Director.

Mr. Zengerle, before we hear from the DAV, whom you are here to represent as an attorney this morning, I want to note that I recently became aware of the very forceful, cogent, and persuasive statement you submitted to the Chairman of the Democratic National Committee back in May 1984, in which you concluded:

> Principles of equality demand that veterans' claims for disability benefits from the VA be placed on the same legal footing as claims for Social Security disability benefits and application for disability retirement benefits from the Board for the Correction of Military Records.

Given your background as a former law clerk to the Chief Justice of the United States and Assistant Secretary of the Air Force, as well as to General Westmoreland, I think it would be very helpful to have your very articulate and incisive 1984 statement printed in the record of this hearing.

I presume you wouldn't object to our doing that?

Mr. ZENGERLE. I would not, Senator.

Chairman CRANSTON. All right. Without objection, it is so ordered.

[The May 1984 statement is retained in the committee files.]

Chairman CRANSTON. Let me say that, in view of the many other places I have to be this morning shortly, I am going to ask Jon Steinberg to pose the questions I wish to ask this panel during the vote, which has just started, and when there is a break in having a Senator here to preside. We may have to recall this panel a little later.

Phil, I would like to ask that you begin; and before you do, I want you to know that we appreciate the positive aspects of your testimony this morning, and there are quite a few such aspects. I am grateful for that.

I am sorry that I have to leave, and I am not sure when I will get back; but we will endeavor to carry on with some Senators present at one time or another. I may be back, but Jon Steinberg will ask questions I had intended to ask, in my absence. Thank you very much.

Mr. STEINBERG. Phil, what we are going to try to do is hold off on your main testimony until Senator Graham returns, which we expect will be shortly. In the interim, I am going to pose some questions that the chairman wished to ask.

So, we will deviate from our normal order for the moment so we can continue to use our time as productively as possible.

Let me start with questions for the DAV, if I may; and then, as the chairman indicated, when Senator Graham returns, we will move back into the direct testimony.

In your organization's testimony before the House Subcommittee on Oversight and Investigation in July of 1983, you testified that the DAV "supports the basic concept of judicial review as that term applies to the Veterans' Administration. That is to say, we do believe that a veteran or the dependent or survivor of the veteran who has received an adverse benefit determination by the VA and who has exhausted all appellate avenues within the VA adjudication process, including action by VA's Central Office and/or the Board of Veterans' Appeals, should be able to receive further redress and judicial proceedings outside the agency."

You indicated at that point that you wanted the review to take place in a court created for that purpose and not in a Federal court, a so-called "Court of Veterans' Appeals," which you also recommended in 1979 in your testimony before this committee.

Our question is: In 1983, did the DAV favor review of individual adverse benefit determinations in proceedings outside the Agency before a special court created for that purpose?

Mr. HEILMAN. In 1983, 5 years ago, and up until 1985, I believe, the position of our organization on judicial review with respect to S. 11 and its predecessors—and I think in 1979 the original bill was S. 330—has always been to oppose judicial review of individual benefit determinations in the Federal district court system and removal of the $10 fee limitation that applies to private attorney representation in VA proceedings on individual benefit determinations.

We have been consistent in our opposition to that approach to judicial review for the past 10 years.

Mr. STEINBERG. I was asking what you favor.

Mr. HEILMAN. Right. At the time of the quote in 1983, our organization had mandated the DAV to seek review through the creation of an independent court of veterans' appeals—a court composed of judges appointed by the President, confirmed by the Senate—whose sole responsibility would be to hear adverse benefit determinations that were unsuccessfully appealed through BVA.

Mr. STEINBERG. Right. You no longer support that?

Mr. HEILMAN. No, we don't. In 1985, our convention delegates rejected such a resolution to support judicial review through the creation of an independent court of veterans' appeals, declined to reaffirm that position, and continued in their opposition to judicial review as presently is proposed by S. 11.

Mr. **Steinberg**. So, in summary, your position at this point in 1988 is that, even if a veteran went through the entire VA adjudication process, received an adverse decision on the merits of the claim from the BVA, and the veteran felt that that decision was incorrect, there should be no recourse outside of the Agency even if the decision itself denying the veteran those benefits was utterly lacking in any rational basis in the evidence such that a manifest injustice had occurred?

There should be no recourse outside the Agency, even to a special court of veterans' appeals; does that correctly state your position?

Mr. **Heilman**. That is correct, Counsel. We do not believe there is a need for outside judicial review of adverse benefit determinations on the facts. That is correct.

Mr. **Steinberg**. Thank you. If you could, for the record, indicate what—other than a change in resolution status—would justify your believing for a number of years that there should be such outside review before a special court of veterans' appeals up until, as you say, 1985 as contrasted with your present position that no such recourse should be afforded to veterans.

If you would do that in writing for the record, sir, so you will have an opportunity to set that forth in detail, we would appreciate that.

Mr. **Heilman**. I will be glad to. I can also comment on it now if you would like.

Mr. **Steinberg**. If you could do so briefly, that would be fine.

Mr. **Heilman**. One of the factors involved—and this occurred specifically during the 1986 hearings on H.R. 585—was that the proponents of judicial review continually misrepresented DAV's position when we were under the mandate to secure a special court of veterans' appeals by saying that our membership wanted us to support judicial review as proposed by bills like S. 330 or S. 336 or S. 11 or H.R. 585.

Our membership, as I recall the discussion at the convention in declining to pursue the special court veterans' appeals, which incidentally wasn't going anywhere—just as S. 11 has not for the past 8 years—was to clarify our position so that we could not continue to be misrepresented in terms of the leadership opposing judicial review, while the membership supported it, because that was not the case.

Mr. **Steinberg**. Thank you. Let me ask you and Jim Magill from the VFW to respond to the question that Senator Cranston posed with respect to the appearance of attorneys before the BVA under S. 2292.

You will recall that he raised—and I amplified somewhat—with Mr. Rosenberg the scenario where an attorney appears to argue a question of law or the lawfulness of a regulation before the BVA and is paid for that, as S. 2292 would permit; and then appears pro bono, as it were, to argue the factual issues.

Our question was: Since one of the concerns both the DAV and the VFW has raised about S. 11 is the specter of an adversarial situation arising, we wonder why you support injecting paid attorneys into the system earlier under S. 2292 than S. 11 would permit, which as you know requires that there be an initial BVA decision before a paid attorney could participate?

Jim, do you want to lead off on that since we have already had several responses from the DAV?

Mr. MAGILL. We will support, as we stated in our statement, that we do support interpretation of the regulation. With the question that you posed as for the attorneys' fact, we do oppose that. We feel that the attorneys, though, will probably want to come in at a level to lay groundwork for their case.

I may respond to that in more detail in writing.

Mr. STEINBERG. That would be fine.

Mr. MAGILL. We would be more than happy to do that.

Mr. STEINBERG. Rick or Joe, do you wish to pick that up?

Mr. HEILMAN. Let me just respond initially, and maybe Mr. Zengerle may want to add to it. Our concern about lawyer involvement in VA proceedings is directed at the involvement at the local level, at the 57 various VA regional offices.

S. 2292 would allow private attorneys to come in after the SOC statement of the case—and essentially that means at BVA—and of course, S. 11 states after the first initial BVA decision. Nevertheless, attorney involvement under S. 2292 would strictly take place at BVA only on questions of the validity of regulations.

It would not take place in the nuts and bolts, bread and butter operation of the VA adjudication process, which is at the 57 VA ROs and hundreds and hundreds of rating boards across the country.

S. 11, even though it restricts private attorney involvement until after the initial BVA denial, nevertheless would let private attorneys in at the local rating board level in cases of remanded decisions and in instances of reopened cases on the same issue that received the first denial. As you know, that happens many, many times.

Mr. STEINBERG. Eleven or twelve percent, I believe; but let us assume that S. 11 did not permit activity back at the regional office level and permitted only activity at the BVA level. Then, there would be the possibility that, under S. 2292, you would have the attorneys involved at an earlier stage.

Would you agree that that possibility would then exist? And arguing the factual issues, as I said, on a pro bono basis?

Mr. HEILMAN. I think you really lost me, Jonathan, there.

Mr. STEINBERG. Let's assume for a moment that S. 11 did not permit—let's remove that issue—after initial BVA decision, a paid attorney to become involved at the regional office level. Let's assume that was not part of S. 11 and that that was prohibited in S. 11.

Let's just look then at what happens before the BVA. And under S. 11, the attorney cannot go before the BVA and be paid until after an initial decision has been rendered on a request for reconsideration; whereas, under S. 2292, the attorney can come in to raise a question of law at any point that the veteran client wishes that raised with the BVA and the attorney is then free to raise any factual arguments that the attorney wishes.

The attorney would not be compensated for that, but he could be doing that on a pro bono basis. That is the parallel that we were trying to explore.

Mr. HEILMAN. I don't think that you would get any support for S. 11, so modified as you just described, from private attorneys because they would in fact insist upon being able to develop the cases in some fashion.

And if S. 11 were to restrict attorney representation on factual matters solely at BVA after the first denial, which means it has come back the second time on the same issue, and then the attorney becomes involved at that point, I don't think that is practical, Counsel, because I think attorneys would just flat out say that they have to be involved in the development of the case. So, I don't think S. 11 so modified is a possible reality.

Mr. STEINBERG. That is, as Mr. Zengerle will tell you, what is called "fighting the hypo"; but I certainly defend your right to do that. Let me turn to some other questions. Joe?

Mr. ZENGERLE. Mr. Steinberg, I would like to respond at least to some degree to what concerns might be present if S. 11 were so modified. To the extent that there is a factual record developed that could not be further supplemented as a result of a clear-cut and unequivocal prohibition in a modified S. 11, what you are proposing in terms of your hypothetical to Mr. Heilman is that a pro bono attorney could operate on the facts of a record that could not be changed and get paid for arguing the legal question as to the validity of the rules.

One would assume in such a situation that, as impractical as it may be to have such a bill or to really believe that attorneys would come in and seek to argue a record that they could not supplement, nevertheless, if it were to come about that such a factual situation were to develop with attorney involvement at the BVA level in a hybrid capacity—paid in some cases and pro bono in others—it would still create ripple effects at the adjudication or fact-development level because the BVA would have to deal with attorney arguments designed to build in problems for the BVA encountering a fact record that could not be supplemented by the attorney.

So, there would be a ripple effect back down to the adjudication level in any event, not as significant as is now possible under what S. 11 would permit, but nonetheless, still a ripple effect.

It seems to me it would have a complicating and formalizing and legalizing effect on what would happen below the BVA level.

Mr. STEINBERG. There may be ways and there may not be ways to deal with that. One way might be to permit the BVA at that point to take whatever additional evidence and supplementation might have been presented at the regional office.

I recognize the concern that both you and Rick have presented, that an attorney once into the case, after initial BVA decision, would want to be in a position to supplement and develop the case; but that need not necessarily occur at the regional office, and that is something that could be explored, but let's not push that hypothetical endlessly.

I see Tony is sitting forward in his seat; so I think I will yield to him momentarily at this point to pursue what I am sure is an issue that he is interested in.

Mr. PRINCIPI. In the final analysis, I think what we are all after is fairness for veterans and the expeditious adjudication of their claims; whether that is done through the judicial system or any other system remains to be seen.

What I think we are sometimes missing in this debate controversy is: Is the system truly broken? We hear of the horror stories, the anecdotal cases; and it seems to me that they do exist in the Veterans' Administration. But I think that any practicing attorney will tell you of isolated horror stories in the Federal district court system.

So, I don't think they are unique to the VA. And of course, we hear the cliches and the slogans—some of them are very, very important—about due process and growing accustomed to revere judicial review, that veterans should be treated no differently than criminals, Social Security recipients, illegal aliens; and that is certainly true.

What I would like to ask is: In your opinion, how is the system broken? What empirical evidence exists to show that the system is broken, that the 2.3 million veterans who are currently receiving about $14 billion in service-connected disability compensation are not being treated fairly and that perhaps that number would be double if we had judicial review?

What studies have been done, whether they be through GAO or computer model, to demonstrate that veterans are not being treated fairly by the system? And perhaps we could use that as a basis to say that it is for that reason that we need to change the system, and perhaps we do.

But I think before we do change the system that I have understood to treat veterans very fairly, which could have certain costs associated with it, we should have some underlying justification. Mr. Magill, could you start?

Mr. MAGILL. First, I would like to say that we do not think that it is broken. As I stated in my testimony, occasionally errors in judgment do occur; but for the most part, we think the Board of Veterans' Appeals is doing a good job, Tony.

With respect to studies, to my knowledge there have been none. In fact, if you will read our resolution, we do call for a study of the Board of Veterans' Appeals by an independent third party, which could ascertain once and for all whether the system is broken or, in fact, it is doing the job.

Mr. PRINCIPI. Mr. Heilman or Mr. Zengerle?

Mr. HEILMAN. You are playing havoc with my summarization that I am supposed to give later. I was going to touch on that; things have gotten a little bit reversed this morning.

Mr. STEINBERG. You will have an opportunity to present your statement.

Mr. HEILMAN. I realize that.

Mr. PRINCIPI. Just very briefly, could you respond?

Mr. HEILMAN. Yes, and I will answer your question during my summarization with respect to the study. But I think Mr. Zengerle wanted to add something here.

Mr. ZENGERLE. I wanted to respond to your question, Mr. Principi, and also Jon Steinberg, to request that I be given an opportunity to respond to Senator Cranston's opening statement about my testimony before the Democratic National Platform Committee in 1984.

Six months or so after that testimony, I wrote a piece for the National Review that was accepted by William F. Buckley, the publisher; and after some uncertainty about timing and so forth, we decided the best thing to do was to postpone publication for another time. That piece I would also like to submit for the record to supplement what it was that caused me to modify, to some degree, the testimony that I gave that Senator Cranston referred to.

[Mr. Zengerle's written response appears on p. 311.]

Mr. **Zengerle**. We have today before the committee a proposal, S. 2292, that seeks to address in many ways 90 percent of the problems at 10 percent of the costs, and the piece that I wrote for the National Review that I would like to submit to complement my testimony that Senator Cranston will put in the record was really driven by a concern about legalization of many environments in the United States by courts and lawyers.

The legalization of the veterans' affairs environment is a particularly difficult one to contemplate. The thrust of the modern bar is to be concerned about the costs of courts and lawyers.

There is an example from Florida that indeed we presented to Senator Graham yesterday, in which a woman was shot in the head and spent 12 to 15 hours trying to find a neurosurgeon to handle her difficulties because medical malpractice insurance was so extraordinarily expensive that no one wanted to take the risk.

That is an example of how courts and lawyers in one particular area have created serious difficulty. Legalization of veterans' affairs is something that risks serious headwinds for veterans of the United States; and it seems that, in calculating whether to adopt statutory reform measures regarding judicial review, that risk should not be undertaken, absent what Mr. Principi asked about, which are authoritative, reliable assessments of the degree to which we have problems and the degree to which those problems can be solved by remedies posed and the costs of those remedies.

Absent reliable evidence with respect to that, I believe that the Congress should be very wary and very cautious of throwing the baby out with the bath. We have heard a lot of statements today that suggest that there are remarkable problems regarding the veterans' benefits adjudication process.

We have heard statements that veterans alone——

Mr. **Steinberg**. Joe, excuse me.

Mr. **Zengerle**. Yes?

Mr. **Steinberg**. We just had another roll call begin. We want to let some of this testimony begin. We want to try to make sure we have a chairman here presiding. So, with your permission, I would like to cut you off at this point and ask Senator Graham to please call on a witness.

Senator **Graham**. Mr. E. Philip Riggin, Director of the National Legislative Commission of The American Legion?

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STATEMENT OF E. PHILIP RIGGIN, DIRECTOR, NATIONAL LEGISLATIVE COMMISSION, THE AMERICAN LEGION

Mr. RIGGIN. Thank you, Mr. Chairman. We recognize the difficulties here this morning with the roll call votes, and we will do our best to address the time constraints.

Mr. Chairman, before speaking to the other provisions of legislation under consideration today, it should be noted—and we feel very emphatic about this—that The American Legion has for the last 10 years voiced its recognition that a reasonable and responsible increase is warranted in the fee which claimants may be charged by private attorneys for representation in claims before the Veterans' Administration.

In considering the proposals to remove this restriction and increase the limit on such fees, we do, however, want to ensure that veteran claimants are not forced to pay out a major portion of the benefits to which they are justly entitled for the services of an attorney.

We do not want veterans to face what has happened in the case of many or certain Social Security beneficiaries. We call to the committee's attention the findings of a 1987 report on attorney fee process and Social Security disability cases. Highlighted was the fact that, in an estimated 45 percent of appeal cases before that Agency, the attorney fees were in excess of what the Agency deemed reasonable. Of the $100 million in attorney fees charged successful Social Security claimants in 1984, for example, about $23.6 million involved charges that were subsequently determined to be in excess of the hourly rate standard in use at that time.

Mr. Chairman, we now address the legislation that is under consideration this morning. There are several provisions contained in title I of S. 11 which The American Legion is prepared to support since these would improve certain administrative and adjudicative procedures within the Veterans' Administration.

The American Legion favors the proposal set forth by sections 103, 104, 105, and 107 to improve the adjudicative and appellate process.

Section 103 requires the Chairman of the Board of Veterans' Appeals to submit an annual report to the Congress, detailing the operations and experiences of BVA, to include an evaluation of the Board's ability to ensure the timely disposition of appeals based upon existing and projected personnel and caseload levels.

Section 104 provides for due process notification to any appellant concerning consideration of a newly developed, additional evidence in any claim. It also provides for the notification of the right to a personal hearing on such additional evidence and appeals the member of the Board whose appointment is of a temporary nature would be prohibited from participating in a final vote as to the disposition of the appeal.

Section 105 provides for a personal hearing in the course of the review of the claim and sets forth the circumstances under which a finally disallowed claim may be reopened.

Section 107 requires the Board of Veterans' Appeals to seek an advisory medical opinion in resolving a substantial difference of medical opinion in a claim when that opinion is requested by the claimant.

Again, The American Legion supports all of these administrative improvements, as we see them.

We are, however, opposed to the provision of section 4010 authorizing the serving of interrogatories on any individual, including VA employees. The introduction of interrogatories, enforceable by subpoena in the normal and formal adjudicative process of the VA, would, in our opinion, add an extra burden, the effect and benefit of which is not entirely clear.

Mr. Chairman, both S. 11 and S. 2292 include provisions that would require the VA to adhere by statute to the rulemaking procedures prescribed bv title V, USC, to include publication of any proposed rule in the Federal Register for public comments.

Once promulgated in accordance with section 533 of title V, VA regulations would be subject to judicial review with the exception of the VA disability rating schedule. The American Legion has stated its support on several occasions for the practice that has held the VA regulations and procedures are indeed and should be subject to court review.

Mr. Chairman, with respect to the provision of S. 11 and S. 2292 authorizing judicial review, each measure poses a different means by which veterans may challenge certain decisions by the VA in their claims for benefits; and we will address each proposal separately.

S. 2292 proposes the retention of section 211(a) of title 38 barring judicial review of decisions by VA unless such decisions raise a constitutional issue. However, this same measure, S. 2292, would expand the authority of the Board of Veterans' Appeals so as to permit the adjudication and resolution of challenges to the validity of VA regulations in the course of an appeal.

It would further permit a decision by the BVA on a question of the validity of regulations to be subject to court review.

In keeping with this proposal, we wish to discuss an additional problem which adversely affects the ability of veterans to have their claims fully and fairly adjudicated. Under current regulations, the authority of the BVA to review a veteran's claim is limited to consideration of the issues on appeal as certified by the regional office of jurisdiction.

The American Legion would recommend to this committee to consider the possibility of extending the Board's authority to review and act upon the claimant's entire record, together with the proposal of allowing the Board to address the validity of agency regulations as a means of assuring the fullest possible consideration of the veteran's claim.

Mr. STEINBERG. Phil, may I interrupt for one second?

Mr. RIGGIN. Yes, Jon, you may.

Mr. STEINBERG. Senator Graham is going to have to leave for this roll call.

Mr. RIGGIN. I understand.

Mr. STEINBERG. So, I wanted to let him have an opportunity to speak.

Senator GRAHAM. Mr. Riggin and other members of the panel, I apologize for the nature of this morning's hearing and the several interruptions. I guess that is the typical character of life around here.

As soon as he votes, Senator Cranston will be returning, and other members will be participating through the balance of this morning's hearing. I have a statement which I would like to include in the record, and I hope to be able to participate through some of the balance of this hearing. Thank you.

[The prepared statement of Senator Graham appears on p. 126.]

Mr. RIGGIN. Thank you, Senator.

Mr. STEINBERG. What I would like to do at this point is proceed with some further questions while this vote is going on. I am not certain when the next Senator will emerge, except that Senator DeConcini is scheduled to be here at 11 a.m., and we are trying to see if we can move that forward.

We also must turn to the Judicial Conference witnesses no later than 11:15 a.m. and possibly earlier because the two distinguished judges who are with us this morning have to catch planes out of here shortly after that.

We are trying to do everything we can to make sure that you have a duly elected representative to give your testimony to, and we will continue to make that effort. We just ask your forbearance, if you will.

Let me say this. Phil, you were cut off in mid-sentence. Would you like to complete that thought for the record, or would you like to wait to complete that thought until we have a member back?

Mr. RIGGIN. You probably have a clearer idea of where I was in this testimony than I do at this point. No, that is not necessary, Jon. There is only one other point to be made, and it doesn't really matter whether it is made before an elected member of Congress or however you want to handle that.

Mr. STEINBERG. I just thought that you might want to complete the thought for the transcript at this point, or add whatever points you wish. That would be fine.

Mr. RIGGIN. The point that we were beginning to make was in reference to the scope of judicial review among the respective proposals. We had not yet made that point. That is a new thought. If you think that it is appropriate that we discontinue our presentation at point, that is fine with me.

Mr. STEINBERG. We will leave that entirely up to you. We would be glad to hear from you. We want you to make the presentation in the way that you wish to make it.

Mr. RIGGIN. Fine. Then, why don't I finish the testimony, if that is all right with you?

Mr. STEINBERG. That is fine.

Mr. RIGGIN. With respect to S. 11, The American Legion continues to be opposed to the proposal so as to allow judicial review of VA decisions on claims for veterans' benefits. The American Legion's position on this issue, to permit judicial review of decisions by the VA on benefit claims, is currently set forth in Resolution 140 adopted by our 1986 National Convention.

The adoption of that resolution reflects the opinion of the majority of the delegates to that convention.

The question has been raised, and perhaps rightfully so, as to why The American Legion as the largest veteran organization would not support judicial review as a matter of equity. The American Legion has testified on a number of occasions in support of retention of section 211(a) of the title, on the basis that judicial review would mandate, in our opinion, a transformation of the VA claims process from what is currently an informal one to an adversarial series of proceedings.

We firmly believe that, if this current informality was lost, veterans and others would have a harder time establishing and being successful in prosecuting their claims. While the proponents of judicial review of individual VA claims decisions question this conclusion and suggest that the current system is adversarial and is rigid, we submit to those people that each case is in fact decided upon the evidence of record.

This is not to say, however, that VA's adjudication process, including the Board of Veterans' Appeals, is perfect. However, we also do not subscribe to the adage "If it ain't broke, don't fix it."

Our organization has testified at legislative and oversight hearings before Congress on numerous occasions concerning a variety of complex administrative and budgetary problems.

Mr. STEINBERG. Phil, I am going to ask you to take no more than 1 more minute. We have already given you 2 additional minutes, and I think we have to be fair to the other witnesses.

Mr. RIGGIN. I appreciate that, Jon. The point that I would like to conclude with is that there are some things that can be done, obviously, to fix the existing adjudicative mechanism within the Veterans' Administration.

We are not convinced that the application of judicial review on top of the existing system is the most appropriate way to fix it. We think that veterans' organizations and Congress itself have to share in the responsibility in this regard, and that is that we are requiring the Veterans' Administration to produce high quality decisions under existing circumstances and to produce those decisions with a greater quantity; and we don't believe that the resources are available necessarily there to do that in all cases.

And before we look toward the application of judicial review of individual VA claims, we ought to look at our shared responsibility to ensure that we have the right people in the right place to make all the decisions that are necessary to be made.

Mr. STEINBERG. Thank you very much, Phil. As the chairman indicated, we do appreciate the positive aspects of your testimony this morning.

[The prepared statement of Mr. Riggin appears on p. 177.]

Mr. STEINBERG. Let me add just one word about the situation we find ourselves in, if I may, which we regret very much. One of the reasons that the hearing that had been originally scheduled for last week was scheduled at 8 a.m., which some of you were probably grateful to be relieved from, was to avoid this situation we find ourselves in today, immediately before a recess with a series of votes that are obviously going to continue to occur.

We wish we had proceeded with the hearing on the original schedule. I think you are all aware of why we did postpone the hearing; that was in order to provide an opportunity for an enlarged scope of testimony.

That is all I can say about that. We regret it, and we regret the inconvenience and delay that are taking place.

Let me pose a few more questions that the chairman had intended to ask, if I may. Jim Magill, on page 3 of your statement, you indicate that "limiting judicial review to questions of law and regulation, as in S. 2292, would eliminate the possibility for de novo review of claims," that is, a trial-type factual hearing in court, which would encourage an ever increasing number of lawsuits. You further indicate that you believe S. 11 "lends itself to de novo reviews."

Let me read to you from page 23 of S. 11, which states:

"In no event shall findings of fact made by the Administrator be subject trial de novo by the court." In view of this express prohibition of de novo review in court, can you explain the basis for your concern about S. 11 lending itself to de novo reviews?

Mr. MAGILL. Yes. We basically came up with that assessment because, any time that you do review fact in benefit determinations, we do not see how it can be avoided.

Mr. STEINBERG. I might just ask whether Mr. Riggin, whose organization from early on was extremely concerned about a de novo review situation, in response to which, three Congresses ago, the committee inserted the particular statement in the bill that I read, whether The American Legion shares that concern about de novo reviews occurring, despite an express prohibition that they could occur?

Mr. RIGGIN. The American Legion clearly recognizes that a number of adjustments in legislative initiatives calling for judicial review of individual VA claims made, over the last 6 to 8 years, have been done with The American Legion's concerns—previously expressed concerns—in mind.

Mr. STEINBERG. Your testimony did not raise that issue, I believe.

Mr. RIGGIN. That is right; it did not. And as I recall, Mr. Steinberg, that same issue was also not raised in at least the most recent presentation on the issue, although I don't think it was before this committee. I believe it was before the House Veterans' Affairs Committee.

Mr. STEINBERG. Right.

Mr. RIGGIN. So, we do recognize the proponents of this initiative and their efforts to address those concerns, and we feel that substantially those concerns have been addressed.

Mr. STEINBERG. Thank you. Following up with you, Phil, for a moment; in your testimony on page 1, you express concern regarding excessive attorneys' fees as reported by the Inspector General of the Department of Health and Human Services in Social Security cases. And you raise the possibility of a similar problem arising under S. 11.

We share your concern that attorneys charge only reasonable fees and not excessive fees for services rendered to veterans, and that is why S. 11 has a specific dollar limit for representing a veteran before the BVA, whereas the Social Security Act simply provides that fees must be "reasonable."

Does this difference adequately deal with your concerns? That is, under the Social Security Act, there were no requirements along the lines of those that S. 11 would impose.

Mr. Riggin. I don't believe that our statement makes any particular reference that we have a concern regarding excessive fees as would be provided for or allowed for under S. 11. I don't believe we make any association there at all in our statement.

We simply make a general statement—and not in particular reference to any measure before this committee—and that is simply a statement of concern on our part that the situation not get out of hand.

Mr. Steinberg. As it appears, it has gotten out of hand there.

Mr. Riggin. As it appears to have gotten out of hand before that Agency. Yes, sir. That is the only reason for making that statement.

Mr. Steinberg. Thank you for clarifying that. One other aspect about that study, as we understand it, is that the IG of that Department found that one of the major reasons for the excessive fees was because administrative law judges tended to perfunctorily award fees under the agreements that have been reached between the attorney and the Social Security claimant, without reviewing the individual work that had been performed.

I am sure you are aware of that aspect of the study.

Mr. Riggin. Yes.

Mr. Steinberg. Jack and Rick, you have both been sitting, we hope patiently; and obviously, it is fairly clear that most of our questions have been addressed to the witnesses whose organizational position was in opposition to S. 11.

We appreciate very much the very constructive testimony that each of you has submitted. We want to note with respect to your testimony, Jack, that there are a number of suggestions that you have raised and that we intend to be following up on those suggestions with the Agency.

And Rick, we appreciate all of your efforts in this area and, again, the very detailed, constructive testimony you submitted. If you have any amplification that you wish to add at this point with respect to any of the questions that have thus far been proposed, please do so. Senator Daschle, could you come forward and assist me, please? You can come all the way forward, if you wish. [Laughter.]

Jack, if you have any comments that you wish to make? If you could hold up for 1 second so I can fill in Senator Daschle on exactly what has transpired?

Well, I am going to withdraw that invitation, Jack, and ask you to proceed and enter your testimony at this point. I am sure you will agree that, though he is not an established member of our committee, he is certainly an honorary member of our committee and a great friend of all of ours and of all veterans.

And I guess—having served for how many years on the House committee?

Senator Daschle. Eight.

Mr. Steinberg. Eight years. He certainly has more than an honorary claim to membership here, and he has asked that you go ahead; and we are very grateful. So, please do. Senator Daschle, thank you and welcome.

Senator Daschle. Thank you, Jon. I welcome the panel. They are all friends of mine and people who I know are the most dedicated people in this town to the concerns and needs of veterans. I welcome you and commend you for your interest and would invite you to begin as you see fit. Jack, why don't you get started?

STATEMENT OF R. JACK POWELL, EXECUTIVE DIRECTOR, PARALYZED VETERANS OF AMERICA

Mr. POWELL. Thank you, Senator. I have had the opportunity to testify before you before—different House, same issue.

Mr. STEINBERG. Different script. [Laughter.]

Mr. POWELL. Slightly different. All things change with time, Jon, except those who are immobile or dead. [Laughter.]

Mr. STEINBERG. Right.

Mr. POWELL. The first thing that I would like to do is to point out the fact that what we are doing here today is unique, at least on this issue, and in the Congress of the United States.

For the first time, we have two different pieces of legislation on how to rectify what is perceived as a problem by many veterans; and there are provisions in both pieces of legislation which PVA believes are very meritorious.

Clearly, Senator Cranston has been working on this issue for a decade, and Senator Murkowski has been involved in it since coming to the Senate. We thank them both for the diligence that they have brought to the issue and especially for bringing the conversation to the point of "how to" and "what to."

We think that is extremely important. PVA, as you noted, counsel, has consistently reviewed its stand on judicial review over the years in an attempt to define a position which is, first, reasonable and, second, protects both the rights of veterans and the obligation of the VA and the courts to administer due process consistently and fairly.

PVA's primary support for judicial review comes from the belief that the VA in recent years has been so intransigent in the making of certain rules and regulations and so inflexible in the interpretation of rules and law with regard to individual veteran's claims that intercession by the courts is ultimately advisable and fully warranted.

We believe that judicial review is inevitable and necessary to bring full accountability to the VA in terms of both regulations and benefit determinations.

We support S. 11 as being a legislative vehicle which falls well within the parameters of judicial review legislation called for in PVA's in-house resolutions.

Over the course of the last several years, PVA has had a number of instances where it has been necessary, in our opinion, on behalf of veterans, to go to court. We have been able to get into court and overcome the section 211 barrier on several instances, but the fact that we had to go, and the fact that we had a barrier to overcome are both things that don't make us truly happy.

Many of the decisions that are requiring, in our opinion, a purpose for judicial review and a reason especially for the provisions of S. 2292 are driven by the Office of Management and Budget and driven by budget considerations without regard to law.

One of the areas that we think has been most greatly overlooked in judicial review is the Department of Medicine and Surgery. Whenever anybody talks about judicial review, they think the Department of Veterans' Benefits; and they think, in fact, about a green piece of pasteboard that comes in the mail.

In fact, according to a survey that we did in conjunction with the Independent Budget for veterans, we surveyed 20 hospitals in the VA system and talked to chiefs of staff or hospital directors and found that over two-thirds of those hospitals freely admitted that they were not performing aspects of elective surgery and other techniques appropriate on veterans because of dollars.

The one thing that veterans don't have at all in the system, whether through a BVA or anything else, is any place to appeal a medical determination; and that drives benefit decisions every bit as much as it drives health care.

The idea that a veteran for whom a hip replacement surgery is totally appropriate is given a determination of physical therapy simply because the VA hospital doesn't have the adequate funds to buy the hip replacement unit is every bit as much a denial of a veteran's benefit in the quality of that veteran's life as is a determination on the delimiting date for GI bill benefits.

And perhaps it may have as serious or more serious ramifications. We have talked to the staff of the committee about that, and we hope that actions will be taken now as we debate the issue of what, in fact, judicial considerations veterans are entitled.

We should look at that single largest important benefit to most veterans, which is health care, and find some methodology under this system to provide veterans at least access to an explanation, which any other American in health care is entitled to, of a justification for why they were treated, how they were and why they were denied services.

We have many other points to make about S. 2292 and S. 11. They are contained in our testimony. With everything as unsettled as it was today, we thank you for the opportunity to be here; and we will answer any questions we can.

Senator **Graham**. Thank you, Mr. Powell.

[The prepared statement of Mr. Powell appears on p. 191.]

Senator **Graham**. Mr. Richard E. O'Dell, Vice President of the Vietnam Veterans of America, who will be accompanied by Mr. Paul Egan, Legislative Director.

STATEMENT OF RICHARD E. O'DELL, VICE PRESIDENT, VIETNAM VETERANS OF AMERICA, ACCOMPANIED BY PAUL S. EGAN, LEGISLATIVE DIRECTOR; AND JOSEPH FORCILLO, SENIOR ANALYST, CAMBRIDGE SURVEY RESEARCH

Mr. **Egan**. Thank you, Mr. Chairman. We would like your permission to yield 1 minute of our time for the purpose of turning over the microphone to somebody with the Cambridge Survey Research organization, which is an organization which we commissioned to do a nationwide poll on public opinion on the issue of judicial review.

We feel that this information bears directly on the subject of the hearing, and the same poll was referred to by Senator Kerry when he was here earlier. You may have been here at the same time.

So, if there is no objection, we would like to introduce Joe Forcillo of the Cambridge Survey Research organization at this particular point.

Senator GRAHAM. Without objection.

Mr. FORCILLO. Thank you, Mr. Egan. Good morning, Senator Graham and Senator Daschle. My name is Joseph Forcillo; I am Senior Analyst with Cambridge Survey Research, a Washington, DC public opinion research firm that has conducted research on public issues since 1971. My particular expertise is in public policy research. I completed my Master's Degree in Public Policy at the University of Michigan, with a concentration in quantitative methods.

I am pleased to be here this morning to present to the committee a brief summary of the findings of a recent national survey we conducted of U.S. veterans. Over the last few years, there has been some question about whether American veterans support the current laws governing disputes with the VA.

We attempted to answer this question by asking a nationally representative sample of veterans their opinion on this issue. In the survey, we defined "judicial review" for veterans in layman's terms and provided brief arguments for and against the current system. Veterans were then asked to identify whether they favored or opposed this system.

According to our study, U.S. veterans overwhelmingly would prefer, by a margin of 3 to 1, a change in law that would give them the right to appeal VA decisions beyond the VA to the court. We found that 72 percent of U.S. veterans believe the VA should be subject to the same judicial oversight as every other Government agency, while 22 percent prefer the current system, with the remaining 6 percent uncertain which they preferred.

Senator Graham, in addition to the magnitude of support we found for this change, these results are also significant because they show that this support is widespread. There is strong support among a majority of all veterans' groups, regardless of age, region, and other demographic factors.

I believe the reason for the strength of this support is, in large part, because Americans usually react strongly on questions of fairness; and such was the case this time as well.

Senator GRAHAM. Thank you.

Mr. O'DELL. Thank you, Mr. Forcillo.

Senator GRAHAM. I would like to request that the survey that has just been summarized be submitted for the record.

Mr. O'DELL. Senator Graham, it will be. Thank you.

[The National Survey of Veterans appears on p. 265.]

Mr. O'DELL. You know, the collective membership of all the veterans' service organizations represent but a mere minority of the more than 27 million veterans in this country. In voicing opposition to judicial review of the VA before the Congress, some of these organizations have for years purported to represent the majority of America's veterans.

Clearly, the poll results you just heard announced to this committee reveal that, contrary to past assertions of some veterans' organizations, there is an overwhelming desire among the rank-and-file veterans of this country to have VA decisions reviewable in a court of law.

Our consistent support of judicial review is not only well known to this committee, but to anyone having been associated with veterans' affairs in or out of the Congress. The Senate, in each of the last four Congresses, has passed a bill to accommodate what most believed were the legitimate concerns of other veterans' organizations.

In each instance, the will of the Senate to advance a reasoned and justifiable judicial review bill has failed in the House of Representatives. These legislative failures can be attributed to the inconsistency of some veterans' organizations who, under the guise of constructiveness, supported judicial review before the Senate and then expressed outright opposition before the House Committee on Veterans' Affairs.

Such transparent behavior constitutes a public demonstration of disingenuineness that ought not be missed as the debate on this issue is joined once again on the Senate side of Capitol Hill.

Mr. Chairman, for several reasons, it is well that the original date of this hearing was postponed. First, the postponement accommodated the adding of Senator Murkowski's bill to the agenda. The delay also allowed the Supreme Court to render its decision in the *McKelvey/Traynor* v. *VA* case.

Ironically, the Supreme Court's decision renders irrelevant the limited judicial review provisions of S. 2292.

Senator **GRAHAM**. Mr. O'Dell, would you summarize in 30 seconds?

Mr. **O'DELL**. Mr. Chairman, we have submitted a rather lengthy statement, and with that, let me close. I would point out briefly that we are in opposition to S. 2292, basically because the judicial review provisions of that bill are now shown to already exist in statute.

We would point out that there are good provisions of that bill that we found very favorable; but, by and large, our support is behind S. 11, which does provide for the fundamental issue at stake, and that is the individual right of a veteran to have redress, should he have a dispute with the Government.

Senator **GRAHAM**. Thank you, Mr. O'Dell. Your full statement will be entered in the record. Senator DeConcini will now take the Chair.

[The prepared statement of Mr. O'Dell appears on p. 216.]

Senator **DECONCINI**. We will now hear from Mr. John Heilman, National Legislative Director, Disabled American Veterans, accompanied by Mr. Joseph Zengerle, Esquire.

STATEMENT OF JOHN F. HEILMAN, NATIONAL LEGISLATIVE DIRECTOR, DISABLED AMERICAN VETERANS, ACCOMPANIED BY JOSEPH ZENGERLE, ESQ.

Mr. **HEILMAN**. Thank you, Senator DeConcini. I will summarize my statement, Mr. Chairman. I don't think I mentioned thus far that, of course, Mr. Zengerle is Counsel for the DAV and has been involved in advising us on this issue in the past years. He is with the firm of Bingham, Dana, and Gould here in Washington and is a Vietnam veteran himself, by the way, a service-connected disabled veteran and a life member of the DAV. I will try not to be repetitive of some of the things that were already mentioned during the preceding discussion, but I would like to start out my summarization with making several points that relate to what we believe the frame of mind of the committee should be as it deliberates the issue of judicial review and its application to the VA.

By that I mean not be under several misconceptions that have been advanced over the years during the debate and, indeed, several mentioned here this morning.

Number one, there is no due process violation under the current law. Section 211(a) and its bar of judicial review of factual determinations in the court system or any other forum is not a denial of due process; and that has been spelled out in our testimony and that of other witnesses this morning.

Second, despite the bar contained in 211(a), the committee really should not be under the impression that the VA system is a closed system, that there is no oversight, no scrutiny, no influence from the outside. That is certainly not the case, given the oversight of the Congress, led by two Veterans' Affairs Committees set up specifically to look at veterans' benefits and their system.

And of course, there are the VSOs. There is tremendous oversight given to the Agency; and when you consider the application of judicial review, certainly that should be a mitigating factor, when you try to come to grips with whether outside review in the Federal courts is necessary and how much should it be. Certainly, the oversight and review and scrutiny that goes on right now to the Agency should be noted.

Third, and notwithstanding the comments of the previous witness, there is no widespread dissatisfaction with the VA claims process. There has been a lot of attention, and deservedly so, given to sympathetic claimants who have been unsuccessful in pursuing their appeals through BVA. Those get the attention of the media.

Also, the proponents of judicial review themselves are very vocal in expressing their views; but in terms of the 5 million benefit determinations that are handled each year by the Agency, 99 percent are handled in a satisfactory manner.

While I am sure that members of this committee and the Congress hear from dissatisfied claimants on occasion—probably more than a frequent occasion—that is only natural. That is the real world.

When someone is denied a benefit you are going to hear about it, but you certainly don't hear on a regular basis from 26 million veterans or from the 5 million people who come in contact with the Agency each year; and I think it would be a disservice to the debate in the consideration of this issue to proceed from a basis that veterans are disgusted and sick and tired and don't trust the agency and want it changed fundamentally. That is not true.

That brings me to my final point that I think all of us should be aware of as we consider this issue, and it was raised by Mr. Principi earlier. There has been no study, no definitive analysis on the extent of the problem that exists—if it does exist—in VA and in the claims process, no analysis of the alternative solutions to the problems, whether it is S. 11 or S. 2292, or any other proposal.

And there has been no analysis of the costs involved—the cost-benefit ratio of how you apply judicial review. These things have to be taken into consideration when we consider this issue.

I see that my time is up. Just briefly, we believe that a cautious responsible approach is necessary to this issue, and we see that embodied in S. 2292 and absent in S. 11; and we would urge the committee to favorably act upon the judicial review proposals and BVA independent proposals that are contained in S. 2292. Thank you.

Senator DeConcini. Thank you, Mr. Heilman.

[The prepared statement of Mr. Heilman appears on p. 277.]

Senator DeConcini. We will now proceed with Mr. James N. Magill, Director of the National Legislative Service, Veterans of Foreign Wars of the United States.

STATEMENT OF JAMES N. MAGILL, DIRECTOR, NATIONAL LEGISLATIVE SERVICE, VETERANS OF FOREIGN WARS OF THE UNITED STATES

Mr. Magill. Thank you, sir. I would like to comment also that it is a pleasure to see Mr. Daschle back where we think he belongs, on the Veterans' Affairs Committee panel. Thank you for the opportunity to present our views on S. 11 and S. 2292.

I will try not to go back into ground that we have already covered with the questioning previous to my statement. For many years, of course, proposals have been introduced to afford veterans their right to judicial review of VA benefit decisions.

We support judicial review as mandated by our current resolution; however, this support should not be viewed as being critical of the VA claims process, including the BVA. We have praised its performance in the past; and as I stated before, we do not see any reason to alter that support.

The Board of Veterans' Appeals, under constant pressure for improved timeliness in processing cases and the increasing complexity of its cases, such as radiation exposure and herbicide exposure claims, renders for the most part fair and equitable decisions.

However, human nature being what it is, errors in judgment may occur. For this reason, the VFW believes that veterans should be allowed to utilize the court system when certain actions warrant.

In 1981, the National Commander of the Veterans of Foreign Wars appointed a special committee to study and evaluate the question of judicial review. As a result of this extensive undertaking, the VFW has adopted a position of supporting judicial review of Veterans' Administration benefit determinations in instances only concerning questions of law and regulation.

The voting delegates to our most recent national convention have reaffirmed that position by adopting Resolution No. 613, which is appended to my testimony.

We believe this narrowly drawn resolution would adequately permit dissatisfied claimants to seek relief in the appropriate court on exhaustion of their administrative appeals, meaning no law suit could be initiated after a final decision has been rendered by the BVA.

By limiting judicial review to questions of law and regulation, we believe a flooding of cases to the Federal courts would be avoided and, at the same time, the informal, flexible review procedure currently in place in the VA would be preserved.

Since the VFW is mandated by resolution to support judicial review only in cases concerning questions of law and regulation, we cannot support S. 11 in its present form. S. 11 goes well beyond our mandate, and that includes judicial review of questions of fact in individual benefit determinations, which we believe—as I stated before—could lend itself to de novo review.

On the other hand, S. 2292 more closely adheres to the mandates of our current resolution. As called for in Resolution No. 613, S. 2292 provides for judicial review of law and regulation and would not allow a challenge to a VA decision involving a question of fact.

Also, S. 2292 would give much more independence to the VA's Board of Veterans' Appeals.

In your letter of invitation, you also asked us to address the issue of providing for judicial review at the U.S. Court of Appeals or the U.S. District Court. The VFW believes veterans would be better served if they petitioned directly to the U.S. Court of Appeals.

In conclusion, as I stated before, we don't think the current system is "broke," and we also would like to recognize that S. 2292, in our opinion, would probably be palatable to the entire Congress if it were presented with this bill for final action. This concludes my statement.

Senator DECONCINI. Mr. Magill, thank you. I do want to tell the panelists that we regret the dysjunction and the interruptions we have had today; but as you know, we have had several votes on the floor.

[The prepared statement of Mr. Magill appears on p. 312.]

Senator DECONCINI. I do want to advise you that we may present you some questions which involve how many service officers your organization has. That would be helpful for me to understand the magnitude of what service you are now providing, that is, as claims representatives, and what that salary range is and what you invest in this as an organization. It would be helpful to me to have a little better understanding of the economic significance of this situation as well.

We do have a number of questions, and we will submit them for you for your responses. Thank you very much.

We now will proceed with our distinguished guests from the Judicial Conference. Oh, did you testify, Phil?

Mr. RIGGIN. Yes, sir, I did. It was part of the dysjunction process that you were discussing earlier. [Laughter.]

Senator DECONCINI. I am sorry about that.

Mr. RIGGIN. Oh, that is fine, sir. It was presented.

Senator DECONCINI. I would like to welcome the judges from the Judicial Conference, the Honorable Morris S. Arnold, Judge of the U.S. District Court for the Western District of Arkansas; and Judge Stephen G. Breyer, Judge of the U.S. Court of Appeals for the First Circuit; and Christie Massie. We are pleased to have all of you with us.

Gentlemen, as you know we are short of time, but we do have a few questions we would like to lay on the record this morning. If you could summarize your statements—the full statements will appear in the record, without objection—in about 5 minutes, that would leave us a little time to get to a couple of the questions. Thank you.

Judge **Breyer**. All right, Senator. I will let Judge Arnold be first.

STATEMENT OF HON. MORRIS S. ARNOLD, JUDGE, U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS

Judge **Arnold**. Thank you very much, Mr. Chairman, Senators. Good morning. We welcome the opportunity to appear in a forum provided by a coequal branch of the Government and to present the views of the U.S. courts.

We do represent the Judicial Conference of the United States, which, as you know, is a policymaking body of judges of the United States, composed of 26 judges from all levels of the Federal judiciary and chaired by the Chief Justice of the United States.

We have a number of what might be called transactions cost concerns that I would like to address first; and then, perhaps for half a minute or a minute, talk briefly about the substance of the bill.

As you probably know, the Judicial Conference of the United States, on a biennial basis, requests additional judgeships that it believes are indicated as necessary because of judicial workload statistics. So far, the requests made by the Judicial Conference in 1982, 1984, and 1986 have yet to be met; and we expect that for 1988 the Judicial Conference will also be asking for additional judgeships.

We think that, based on current workload statistics, we are perhaps as many as 105 judges short of doing an adequate job for the people of the United States. So, we think that one of the concerns that must necessarily be raised by this bill is the extent to which the workload of the Federal courts will be increased.

As Judge Breyer has stated, we are not worried about work. We work hard already, and we will continue to work hard. What we are worried about is not the prospect of more work, but rather the prospect of a diminution in the quality of the service that we provide for the people of the United States. Because, necessarily, as the number of cases go up—there being only a certain number of hours in the day that can be devoted to judicial work or other kinds of work—the quality of the result is necessarily going to be affected.

We estimate that S. 11 would create a need for at least 11 new district judges and two new circuit judges. We suggest—and of course, we are not clear on the question of whether the system is broken, as some people have put it here today in their testimony—that is a political question, the answer to which is entrusted, of course, to the legislative and executive branches.

Assuming that the system is broken in some respect, however, we would suggest that a more appropriate response than S. 11 to the difficulty would be the creation of an article 1 court that could develop expertise in these matters.

I might note, as an aside, that even if S. 11 were passed, it would probably happen that the real decisions on these matters would be made most frequently by U.S. Magistrates who, in fact, as you know, are article 1 judges.

We think that the kind of factual determinations, and the context in which these cases arise, involve technical medical evidence that is best dealt with by people who develop an expertise with respect to these kinds of matters, much the way workmen's compensation cases are dealt with today on the State level.

Let me now turn briefly to some concerns that I have developed with respect to the substance of S. 11. I note that the standard of review with respect to facts is a standard which I, at least, have not seen before. Namely that a finding of fact would be set aside when it is "so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice would result if such findings were not set aside."

I would suggest to you that almost any factual finding could survive such a test; and therefore, I think that the real work that would be done under this standard would not be deciding whether the decision below could survive it, but rather would have to do with and focus on the matter of attorneys' fees. Even if a claimant's suggestion that the court below erred was not accepted, nevertheless, the court would be required to award a reasonable fee, taking into consideration the likelihood that the time the action was filed that the claimant would prevail.

So, I suggest to you that most of these cases—or many of them, at least—would resolve themselves into a situation in which a district court would spend almost all of its time deciding attorneys' fees matters. While those are obviously important matters, I think that the main business of the U.S. courts would be deflected to a degree by a consideration of those kinds of things. Thank you very much.

[The prepared statement of Judge Arnold appears on p. 318.]

Judge **Breyer**. Could I have a few minutes, Senator?

Senator **DeConcini**. Yes, go ahead.

STATEMENT OF HON. STEPHEN G. BREYER, JUDGE, U.S. COURT OF APPEALS FOR THE FIRST CIRCUIT

Judge **Breyer**. Senator, I will run through seven points. We are representing the Judicial Conference. It is their position that we shall present.

Point one is that the Judicial Conference is against any bill because of the impact on the judicial system.

Point two, the reason for the Conference's opposition has nothing whatsoever to do with the importance of the underlying veterans' problem. A person who has been hurt in war has a problem that is at least as important as a merger, as a contract, as much of what we see in court every day.

Point three is that the Conference's position rests in part in the fact that courts of appeals are not particularly good at reviewing Agency fact-findings. The reason that agencies were first set up was because people thought courts were not reviewing fact-based railroad "reparations proceedings" very well. The courts weren't expert about the individual cases; they didn't know how to set out burdens of proof, and they reached different results in different parts of the country.

Therefore, Congress created the ICC, an Agency which was supposed to be expert on the individual railroad charges. The Agency is supposed to know how to set up burdens of proof to deal with those factual matters. We would get uniformity. That was the theory.

Whether that theory is, or is not, working out in the case of veterans' benefits is up to you to decide. Just remember that the reason we created agencies in the first place is because Congress thought courts weren't performing similar functions very well.

I know what I do each day, and I believe that reviewing Agency fact-finding is something I don't do very well. Now, maybe I shouldn't admit that, but it is true. I know it from my work with Social Security cases.

Whether I should admit it or not, I admit it. And therefore, I hope that we do not have significant additional work of a sort that other institutions might perform comparatively better.

Point four, life isn't perfect; so why object simply because Federal judges may not perform this task perfectly? Judge Arnold said this very well.

I write about 60 opinions a year, real opinions, 5 to 15 pages in the Federal reporter. Divide that number by my working week, remember that I hear oral arguments. I read 18 sets of briefs each month. I have 3 weeks left over each month for six or more real opinions that I must sit at my desk and write. I am not overworked. I will spend about the same amount of time working regardless of the workload. But two opinions per week means 2-day opinions or 3-day opinions.

If you in Congress tell me that I should write 1-day opinions, I will do it. If you say half-day opinions, I will write them. I will write whatever you tell me to write. But I will tell you that the quality of the opinions will deteriorate. And, that is a big problem. On that point, I would like to submit for the record remarks I made at Williamsburg.

Senator **DeConcini**. Without objection.

[The remarks made at Williamsburg, VA appear on p. 364.]

Judge **Breyer**. There are other ways, in principle at least of dealing with—given what the other witnesses have said—what sounds like a problem in the veterans' area. I don't know the extent to which they or you have considered the other ways, but I hope you are aware of them. There have been proposals made for independent Article 1 Social Security/VA medical benefits courts. Courts that are independent and not under the control of the Agency.

Professor Mashaw at Yale has written about another set of alternatives. He is very disillusioned with the workings of "due process" procedures in the Social Security area. He argues for certain management type controls with independent managerial inspectors or incentive systems designed to increase Agency accuracy. One must have random checks on Agency accuracy, with rewards or punishments applicable to decisionmakers within the Agency who make inaccurate decisions. Such a system is described in Professor Mashaw's book.

Simply flag the possibility that there are other ways to solve the underlying veterans' problem. Nobody makes light of that problem.

The sixth point is that I have looked through Senator Murkowski's bill; and now, with my administrative law professor's hat on, rather than my Judicial Conference hat, I think there are some drafting problems, six that I would like to flag; but I won't do that now.

Senator **DECONCINI**. Will you submit those to us, Judge?

Judge **BREYER**. Yes.

[Subsequently, Judge Breyer furnished the following information:]

DRAFTING PROBLEMS IN S. 2292

1. S. 2292's definition of "rule" seems drawn from "ripeness" cases. It might be preferable to leave "rule" undefined (or to cross-reference the Administrative Procedure Act) rather than to create a new linguistic standard for courts to interpret.

2. S. 2292 says that a court will determine the meaning of an agency's rule. This is contrary to ordinary administrative law principles which require a court to defer to an agency's interpretation of its own rules. *See Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 413-14 (1945).

3. The bill's standard or review is simply "arbitrary" rather than the more ordinary "arbitrary, capricious, abuse of discretion." It may be preferable (and would produce uniformity) simply to cross-reference the relevant part of the APA.

4. The bill requires a Court of Appeals to set attorneys' fees. It is difficult for Courts of Appeals to resolve any contested issues involved in matters of this sort, as those courts lack factfinding procedures.

5. The bill requires a court to award legal fees even where the attorney *loses*, adjusted by the probability of his winning. Any court, but particularly a Court of Appeals, would have difficulty making the judgments needed to apply this standard. The standard, as also found in S. 11, threatens to create considerable time-consuming, complex attorney's fees litigation, without much offsetting benefit.

6. S. 2292 requires the agency to use "notice and comment" procedures in areas ("loans, grants, benefits") now specifically exempted from 5 U.S.C. § 553's "notice and comment" provisions. Why should this agency *alone* follow this procedure in this normally exempt area, and *only* in the exempt area?

Judge **BREYER**. A final seventh point is to reiterate that there is a drafting problem in S. 11. You may have written a standard of review that a veteran would find virtually impossible to meet. Yet, the bill also says the courts are supposed to award attorneys' fees even when the veteran loses. Courts of Appeals find it difficult to determine the amounts of any contested request for fees. We cannot easily arrange for hearings.

Thus, I worry that S. 11 would have the courts spend their time trying to award attorneys' fees in the cases where the veteran could not meet the tough standard of review rather than doing what you want us to do, which is to review the veterans' claims.

[The prepared statement of Judge Breyer appears on p. 318.]

Senator **DECONCINI**. Judges, do you believe the standard for factual review as articulated in S. 11 would invite you to substitute your judgment for what the Board of Veterans' Appeals has rendered?

Judge **BREYER**. No.

Judge **ARNOLD**. No.

Senator **DECONCINI**. All right. Do you think then that you would be required to use a more stringent judgment?

Judge **BREYER**. Stringent in the sense that it would be very, very, very, very hard to overturn what the VA did.

Judge **Arnold**. Yes, almost impossible.

Senator **DeConcini**. Now, Judge Breyer, what concerns me about your intellectual argument here—and indeed, it is very persuasive—but where does the aggrieved person have an opportunity to go to your court?

Judge **Breyer**. That is a very good question.

Senator **DeConcini**. Why shouldn't an aggrieved veteran have an opportunity to go to your court even if you are not an expert? What if you are not an expert in antitrust or you are not an expert in criminal law, and yet that is thrust on you?

Why should you draw a distinction and say this is not there?

Judge **Breyer**. My honest reaction is phrased not in terms of a "right to go to court," but whether an article III court is the best institution to solve the problem. You see somebody who is hurt, and perhaps there are a lot of people who are hurt. Now, somebody says: You know what they should do? They should go to a dentist. You say, gee, a dentist can do it; they are trained in medicine, but they aren't quite the right person.

I can understand why people would say to come to us; we can do the job. If you tell us to do it, we will do it; but I will tell you that I am not satisfied with the kind of review factual matters will get, nor am I satisfied that we are the best or the only institution that could do the job.

Senator **DeConcini**. What do you tell a criminal defendant?

Judge **Breyer**. A criminal defendant?

Senator **DeConcini**. He is going to do okay?

Judge **Breyer**. No.

Senator **DeConcini**. Because the courts understand it and they are experts in that. But someone who is injured is not going to do okay because—and you are very honest about it—you are not an expert on that?

Judge **Breyer**. Most of the cases that come up before us on appeal in the criminal law are not cases where we are simply asked to review fact finding.

Senator **DeConcini**. What about a personal injury case that comes before you?

Judge **Breyer**. Again, the appeals normally raise on legal matters that are not purely fact-based. The closest analogy that you have are the Social Security cases. And really the strongest way to put your argument—and you have put it very well—is that, the courts now review Social Security cases, and most of them involve pure factual review. So, why shouldn't the veteran, who has been hurt in wartime be treated at least as well as the Social Security recipient who has been injured in peacetime? That is a very, very strong argument. I will say to only that I am not happy with the fact review appellate courts can provide in the Social Security area either.

Senator **DeConcini**. I appreciate your candor, Judge; and I also, as you know, have the greatest admiration and respect for you, having worked with you on the Judiciary Committee here. But I just have a hard time accepting that court of appeals judges cannot make factual determinations and do it well because you are there because of the outstanding legal background that you have; or you wouldn't be there.

I just find that really difficult to accept. In the 9th circuit, that I know a little bit more about, I know of at least three or four of those judges I would be totally confident of their making that review. Now, they may agree with you, that they feel inadequate to do this. I haven't talked to them about it.

Judge Breyer. Well, I don't want to say that I feel personally inadequate. [Laughter.]

I wish that you could follow us around each day. I know what your day is like; you should know what mine is like.

Senator DeConcini. Yes.

Judge Breyer. What I want you to see first are the cases where I must write the 5 to 15 page opinions. Then, look at the time remaining for where all that is at stake is reviewing an ALJ's factual determinations. You will see that there is a limited time in the day.

Senator DeConcini. Sure.

Judge Breyer. How many minutes do you want me to spend on the latter sort of case compared to the first sort?

Senator DeConcini. But Judge, isn't it a fact that, as Congress passes more laws and puts more on the judiciary, which we do, it is also up to us to take advice from you that you need more courts and more judges, as Judge Arnold has pointed out?

Now, if we thrust this upon you—good or bad—and you have to cut your opinion days down to half a day, that is a problem we have to address because you could always say not to give you antitrust cases because they take too long.

Judge Breyer. Yes.

Senator DeConcini. We know that courts have to spend an average of 20 days on each antitrust case because it is complicated. But what I am hearing today is don't do that to us. But that isn't realistic or practical.

So, it just seems to me that the problem is that, if you get into a feeling that judicial review has some merit, then it is up to us to provide the resources. If it doesn't have the merits—and that, it seems to me, is what we are really talking about—then we shouldn't do it. That is my observation.

Judge Breyer. It is your judgment on this that matters. I have been discussing this only from the Judicial Conference's point of view.

Senator DeConcini. And I don't want to downgrade that at all. I appreciate your being here and taking the time to give thought to your views.

Judge Breyer. I would be curious, if it is possible to study management-type review, or independent article 1 court-type review, compared with traditional article III court review.

I would like to look at those side-by-side, and I would like to ask if I were in the veterans' organization, which of those would give me the best review.

Senator DeConcini. Yes. Thank you. Does the Senator from South Dakota have any questions?

Senator Daschle. Mr. Chairman in the interest of time I will pass; but I appreciate your line of questioning, and I have to commend Judge Breyer for his comments as well.

You know, we could pursue this thing ad infinitum, but isn't what you are talking about a lack of adequate resources in the judicial branch?

Judge **Breyer**. Yes.

Senator **Daschle**. If you had the resources, you wouldn't be making the argument that veteran's judicial review would overload the courts. We have got to give you the resources. If you had the resources, then we could go back and talk about the real question. Are veterans being denied a fundamental right? I think you would say "Yes," and that is all that has to be said.

Senator **DeConcini**. Judge Arnold and Judge Breyer, thank you very much. We appreciate your testimony.

I am going to yield to the Senator from South Dakota, who has a statement he would like to make at this time.

STATEMENT OF HON. THOMAS A. DASCHLE, A U.S. SENATOR FROM THE STATE OF SOUTH DAKOTA

Senator **Daschle**. Mr. Chairman, I am going to submit my statement for the record. Let me just commend the committee—the chairman, the ranking member—for their willingness to hold this hearing. The fact is that we wouldn't be here at all if not for the fact that the Veterans' Affairs Committee in the House of Representatives has resisted judicial review for many years.

The Senate is on record in successive Congresses in support of judicial review. We are preaching to the choir here. We understand the consequences. We are talking about something very simple, a fundamental question about the right of veterans to have the same opportunities to be heard in court as any other American.

What an irony that the veterans' who have fought to see that we all have these legal rights, are the very ones who are being denied those rights now. So, I hope that this year we can finally resolve this matter.

I hope we can find some compromise. We can talk about all the reasons why judicial review may not work, but it really boils down to whether or not we care more about the convenience of the system or the convenience of veterans. It hasn't been very convenient for the veterans when the system has not worked.

Let there be no mistake—the current VA claim adjudication system is not broken. I admit that, and I will argue to the last day that we have, for the most part, an excellent system. But there are occasions in any system—regardless of how good it may be—when it doesn't work for an individual.

Every rule has an exception, and there are exceptions documented throughout the country with regard to the need for some form of judicial review in those cases where the system hasn't worked. I have them in South Dakota with World War II veterans, with Korean veterans, with Vietnam veterans. Every State has them.

Each one of us has constituents who are victims of a system that simply hasn't provided the kind of justice they deserve. They have been more than inconvenienced.

So, I hope this year that we can take the proposals that have been presented and find some compromise. We must reach out to those veterans who dispute VA decisions, for they deserve our support and our consideration. I must say that any compromise, regardless of how well accepted it might be with all parties involved, simply will never have my support unless it includes the right to appeal questions of fact.

We have got to have the right to appeal questions of fact as the foundation for any kind of judicial review legislation that is considered by the Senate. If questions of fact are not included, I will object because that, to me, is the fundamental issue.

Once that happens, I will be on the front lines of the Senate floor and in this committee and wherever else we need to garner the necessary votes.

Let me commend especially the PVA. It took some courage for them to do what they have done this year. I applaud them enthusiastically for their willingness to come forth as they have and admit the fact that they have changed their position.

I also want to commend the DAV and the VFW. They are not where I hope they eventually will be on this issue, but they have come a long way as well. We hope they will come just a little bit farther and support the right to appeal decisions based on questions of fact. But we are making progress.

I would hope that, given the fact that the Senate has demonstrated leadership on the judicial review issue in the past Congresses, it will do so again this year, so, at long last, we can resolve this matter.

I thank the chairman for giving me this time. I am sure you will hear some other very good testimony. I regret that I have to move along. I really appreciate the willingness of the committee to give me an opportunity to sit right up here with the hierarchy of the committee.

Senator DECONCINI. Senator Daschle, we thank you for your leadership here and your very clear position and longstanding position in this area. It was very clear when you were in the House and you have carried it over to the Senate.

[The prepared statement of Senator Daschle appears on p. 380.]

Senator DECONCINI. Ladies and gentlemen, we have a time constraint. I have to leave at 12 o'clock and I regret that. Because of the votes, we are going to have to move forward here. All of your statements will appear in the record, and I am going to reserve the opportunity to send you questions instead of going into questions now.

We would ask that you restrict your testimony to 5 minutes or less and just summarize for us quickly so that we do have a record here. We will have an opportunity to put the questions in with your statements. First, we will start with Mr. Frank Weil, National Secretary, American Veterans Committee; and then we will go to Dorothy Legarreta, Ph.D., President, National Association of Radiation Survivors, of California; Mr. J. Thomas Burch, Jr. Chairman, National Vietnam Veterans Coalition, accompanied by Mr. William Bennett, General Secretary; and Mr. Philip Cushman of Oregon, Chairman, Veterans for Due Process, accompanied by Mr. Sidney Cooper of New York, National Legislative Director.

Mr. Weil, would you begin?

STATEMENT OF FRANK E.G. WEIL, NATIONAL SECRETARY, AMERICAN VETERANS COMMITTEE

Mr. **Weil**. Thank you, Mr. Chairman. Summarizing our position, we support S. 11 with one exception. That exception was alluded to both by Senator Daschle and by Judge Breyer.

The area in which S. 11 would allow review when it comes to fact questions is far too restricted. I have never seen such a restricted definition as appears in proposed 4026; at least we should strike the word "utterly" and the word "grievous."

The American Veterans Committee certainly agrees with Senator Daschle. We do need some review of facts.

Now, this testimony was prepared before we had an opportunity to look at S. 2292. I think the Senate would be doing best if it comes up with an amalgam of the two bills because the Murkowski bill addresses some areas that S. 11 does not go into.

The regulations do need to be reviewed by the judiciary, as do factual situations. I don't think we can restrict it on either side, and I think some amalgam of the two bills would be the best service that veterans could have.

And if push comes to shove, AVC would not be opposed to a specialized docket for one court, as long as there is something outside the VA to which not only the regulations but the manner in which the regulations are applied to the individual veteran's case can be reviewed by an independent agency.

And when it comes to the restrictions on attorneys' fees, my testimony contains an instance where an attorney working pro bono was able to obtain for a veteran's widow, where she had been rejected five times based on the work of various claims representatives, when he brought his skills to bear and brought in expert witnesses, the BVA changed its mind and approved benefits for this widow.

I believe S. 11, with the exception of the fact situation, some features of S. 2292, and dropping the $10 limit—or restricting the $10 limit to the very initial stages—would be the best way to go. Thank you, Senator.

Senator **DeConcini**. Thank you very much.

[The prepared statement of Mr. Weil appears on p. 383.]

Senator **DeConcini**. Dr. Legarreta, would you begin.

STATEMENT OF DR. DOROTHY LEGARRETA, PRESIDENT, NATIONAL ASSOCIATION OF RADIATION SURVIVORS

Dr. **Legarreta**. Thank you, Senator DeConcini. I am Dr. Dorothy Legarreta, the Chair of the National Association of Radiation Survivors, a 6,000 member advocacy group for both atomic veterans and atomic civilians, of which I am one.

As you know, we have supported judicial review from the beginning of our organization, and we are in favor of the S. 11 approach, with some changes in the fact standards. Although we appreciate very much Senator Murkowski's bill, we find it inadequate given the extent of the problem in the case particularly of atomic veterans and veterans suffering from dioxin exposure.

Rather than go into the specifics of the act, I am going to turn some of my time over to veterans' due process and will instead focus on some of the findings of our *NARS* v. *Turnage* litigation, which indicates to many of us that the system in the case of atomic veterans and dioxin veterans is very badly bent, if not "broke."

I am just going to read a few of the findings of the court in the *NARS* v. *Turnage* litigation, which indicate overall what in the agency needs to be done and that judicial review must be put into place.

First of all, as you know, the VA was sanctioned over $145,000 for shredding records, including records of error rates in the various regional offices. My testimony indicated that we were given information which was not disputed that error rates in some Veterans' Administration regional offices reached 14 percent.

I am informed by the BVA testimony that 21 percent is the new high for error rates in one of the regional offices; that means that more than one out of five veterans is not getting the benefits he or she is supposed to get.

Another problem was the fact that the VA would harass its officials who tried to tell the truth in depositions and in open court, and that is documented in the court record. A good deal of information about what really goes on in the VA comes from deep throat letters from documents slipped to groups such as ours and the BVA.

And it is a terrible situation when the oversight of this Agency is so poor that the truth has to come out through deep throat letters.

I do want to say that the number of atomic veterans' claims has reached nearly 9,000, and most of those, as you know, have been denied. And we have found, through the VA testimony, that 37 total out of 9,000 have been granted.

I want to tell you just a little bit about a typical atomic veteran, which we found also from the VA records. He is typically in his late fifties or early sixties. He has crushing medical burdens; over 40 of the veterans report up to $20,000 a year in medical costs. His average monthly income for himself and his spouse, and frequently a child who is genetically affected, is $809 a month. And typically, he has attended fewer than 11 grades of school.

So, the VA maze for adjudication is very difficult for a veteran to go through. That is why we are supporting an end to the fee cap.

Senator **DeConcini**. Thank you.

Dr. **Legarreta**. I have one more comment. I would like to say that we had a computer printout of the VA random sample that found that of 700 radiation claims, 196 had radiogenic illnesses that should have been compensated because of the 1985 radiogenic regulations. Unfortunately, only 6 out of that 196 had received their benefits.

Therefore, we feel that judicial review is imperative. Thank you.

Senator **DeConcini**. Thank you very much.

[The prepared statement of Dr. Legarreta appears on p. 389.]

Senator **DeConcini**. Mr. Burch?

STATEMENT OF J. THOMAS BURCH, JR., CHAIRMAN, NATIONAL VIETNAM VETERANS COALITION, ACCOMPANIED BY WILLIAM T. BENNETT, GENERAL SECRETARY

Mr. **Burch**. Mr. Chairman, we thank you for this opportunity to testify before this committee, being the first time we have had a chance to come directly before Congress to testify on this issue.

The National Vietnam Veterans Coalition is a federation of approximately 45 Vietnam veteran and Vietnam veteran issue organizations. One of our main issues that we have formed this federation around is judicial review.

For our substantive comments, I would like to have Mr. William T. Bennett, who is a practicing attorney and General Secretary of the Coalition, give our points on judicial review.

Mr. **Bennett**. Thank you, Senator. I think we have probably three basic arguments in favor of judicial review, the first being the basic due process argument that any claimant should have the right to protection from arbitrary and capricious administrative action.

We also think that the Applegate subcommittee in the House has demonstrated—and these are the friends of the VA we are relying on, not the critics of the VA system—showing that the system is on terrific overload and that the arbitrary decisionmaking is plainly going to be on the increase, no matter how bona fide the efforts to clear the situation up are.

Clearly, if a person in our system wants the right to an attorney—a first amendment right—they should have that right. And if they want to pay, why shouldn't they be able to?

We finally argue that there is certainly a tremendous estrangement among grass roots Vietnam veterans to the VA, whether fair or unfair; and we feel that enacting judicial review, allowing outside review, would hopefully give a perception of more fairness in the system.

Now, I think one of the things that has tended to be overlooked in this whole issue is legal economics. The fee structure as envisioned in S. 11 clearly favors contingency fees and makes it clear that attorneys are only going to be interested in taking winning cases.

This means that if, indeed, the system is well structured, there are going to be very few cases to appeal into a Federal court. Conversely, if the system is as bad as the critics state, I submit that is an indictment of the Veterans' Administration; and it is a more important thing to take care of than any perceived overcrowding of the Federal courts.

There has been the concern on defensive recordbuilding that might occur if judicial review were enacted. We have that worked out in our statement. We estimate that perhaps the total impact would be between 1 and 2 percent.

And I guess in my short time remaining, the one thing I would like to stress—that again gets overlooked—is that as long as you have the service officer in the system, even if you allow the attorneys into the system, I have no question but that there is going to be an increased focus on what the service officer is capable of doing; and I don't think too many people are going to retain attorneys when they can get the service officer for free.

Thank you.

Mr. BURCH. Mr. Chairman, we would like to be on record as in support of S. 11.

Senator DECONCINI. Thank you very much.

[The prepared statement of Mr. Burch appears on p. 391.]

Senator DECONCINI. Mr. Cushman?

STATEMENT OF PHILIP CUSHMAN, PRESIDENT, VETERANS DUE PROCESS, INC., ACCOMPANIED BY SIDNEY COOPER, NATIONAL LEGISLATIVE DIRECTOR

Mr. CUSHMAN. My name is Philip Cushman. I am the National President of Veterans Due Process, Inc. based in Portland, OR. Mr. Cooper is our National Legislative Director and will present an overview of our written testimony; but I would just like to say that we believe that the VA "Iron Triangle" system of justice is "broke."

Existing congressional hearings records, the NARS trial record, and numerous other records clearly establish that the VA can, easily, wrongfully and/or illegally deny needed medical care or disability compensation for war injuries to any veteran, in order to satisfy Agency budgetary constraints or for any other reason. Therefore Veterans Due Process supports S. 11.

The single major point which I want to make today concerns the fact that the American people are being deceived by our Government by not being warned about the fact that if their loved ones are injured as a direct result of their performance of military duties, while honorably and patriotically defending America and her constitution, that those loved ones will—for the rest of their lives—have no legal enforceable right to necessary VA medical care or disability compensation, etc., concerning such war injuries.

Our fellow Americans now trustingly assume without question that their war injured loved ones will enjoy the basic legal rights and freedoms which they were injured defending for every other citizen, including meaningful access to the "American system of justice" but they are being deceived.

It appears very likely that the Senate will pass S. 11, as it has four times during the past 10 years, once again attempting to make the VA accountable to the courts; but just as likely appears the certainty that Congressman Montgomery will once again ignore the Senate action and kill the similar House bill.

As an ex-Marine injured in Vietnam, I tell you that I believe that it is a dirty trick, to send patriotic young Americans off to war to defend the Constitution and, without warning, strip us of its guaranteed legal protections if we are injured defending it. Sadly, it appears as though this betrayal will continue, as will serious VA abuses of power.

If VA judicial review again dies, Veterans Due Process believes that Congress must take immediate emergency action to protect future veterans' by stopping this deception and ensuring that every American who enters the military, and their loved ones, are warned about this clear and serious danger.

The present policy of no warning is unconscionable and, incredibly, is based on trust. Please stop this perfidious betrayal now.

Senator DECONCINI. Mr. Cooper, would you begin.

Mr. COOPER. Veterans Due Process, in behalf of millions of American veterans, wishes to express its strong disapproval of this plagued—take it, VA nonadversarial system of injustice which has caused veterans so much hardship, degradation, homelessness, and despair. Stonewalling, red herrings, smokescreens no longer will suffice to keep the awful truth from the American people.

This plague, take-it system of injustice denies veterans' rights which are accorded traitors, spies, criminals, and perverts, such as the right to an attorney and a day in court.

Consequently, veterans' interests are routinely trampled by bureaucrats with unbridled power whose treatment of veterans has become the shame of a Nation. Bureaucrats with competing interests, primarily their own—involving—budgetary considerations, empire building, promotion, monetary awards and undisclosed interests harboring secret agendas have supplanted fairness and justice at the VA.

Senator DECONCINI. Mr. Cooper, I have to ask you to summarize, please, and conclude.

Mr. COOPER. I didn't have 2 minutes. Senator DeConcini, we are representing people who have never before had the opportunity to present their views.

Senator DECONCINI. You have had an opportunity. You have the best friends that you have ever had right on this committee, and I advise you to submit your statement. I am going to ask Counsel here to stay later and ask you questions. You will get a chance.

Mr. COOPER. All right. Let me sum up then.

Senator DECONCINI. I am sorry but your time has expired.

Mr. COOPER. For God's sake, you are never going to hear the stuff that I am going to tell you. Do you know why?

Senator DECONCINI. Thank you, Mr. Cooper.

Mr. COOPER. Will you let me sum up, then?

Senator DECONCINI. No, Mr. Cooper, your time is up.

Mr. COOPER. Will you let me sum up, please?

Senator DECONCINI. Mr. Cooper, your full statement will appear in the record.

Mr. COOPER. In other words, this Senate is denying the true veterans the opportunity of expressing its disapproval of Congress?

[The prepared statement of Mr. Cooper appears on p. 397.]

Senator DECONCINI. Mr. Cooper, thank you. Gentlemen and ladies, I am going to have to leave, but I am going to have Counsel stay here and go through a number of questions that we have for you so they will be on the record and so that you don't have to leave.

Now, Mr. Ivers——

Mr. COOPER. I wish I could complete my statement after the VA has testified. Would that be satisfactory, even though no one will be here? Can I use the room, sir, to use it as a staging area for our statement?

Senator DECONCINI. Thank you, Mr. Cooper, very much for your testimony. You may have an opportunity to answer questions. We have questions from Counsel, and they will be directed to Mr.

Cushman; and if Mr. Cushman wants to yield to you to answer those questions, that would be most appropriate.

Now, Mr. Ivers, because of time constraints, would you come forward and present your statement; and then you can sit back and we will do these questions, and then we will submit questions to you.

Mr. IVERS. Mr. Chairman, I would prefer not to share a table with these people. You have heard the comments that they have made, and you have heard the direction it has taken.

Mr. COOPER. You have not heard our comments, sir.

Mr. IVERS. I would ask, Senator, if I may submit my statement for the record? And we will be glad to respond to any questions in writing.

Senator DECONCINI. Mr. Ivers, this is not a personal matter. There is nobody personally hostile to you. All I want to do is have you have a chance to present your 3 minutes, and then you can get up and leave if you like.

You know, Senator Kerry sat here with a panel with whom he didn't agree. Maybe you would like to sit over here on the side and give me your statement so we can put it in the record.

Mr. IVERS. You put me in a very awkward position, Senator.

Senator DECONCINI. Why don't you sit over here on the side then?

Mr. COOPER. I am willing to move, sir, if that is your problem.

Mr. IVERS. I will sit here.

Senator DECONCINI. That will be fine. Just summarize your statement and then get up and sit back in the audience. Then, after the questions are given to this panel, then you can be called back up. I just wanted you to have an opportunity to present a summary of your statement.

STATEMENT OF DONALD L. IVERS, GENERAL COUNSEL, VETERANS' ADMINISTRATION

Mr. IVERS. Mr. Chairman, I appreciate the opportunity to appear here on behalf of the Veterans' Administration. I will say that I am proud to appear here on behalf of the Veterans' Administration. I think the Veterans' Administration is a fine organization. I think this committee does a fine job in advising us as to direction and as to purpose.

I would ask that my full statement be submitted in its entirety for the record.

Senator DECONCINI. Without objection, that will occur.

Mr. IVERS. And rather than going into any of the details of that statement, I would like to make a couple of comments; but I would like to say before I start that that there should be no inference from anything that I say here that our position with respect to judicial review has changed.

The Veterans' Administration remains opposed to judicial review and especially that as proposed in S. 11.

However, I would like to make two points. First of all, judicial review presented in its classic form is very attractive; however, as you can tell from the proceedings here today and from reading through the proceedings of past hearings both in this chamber and in the House, there is much, much more to the issue of judicial review than simply giving to veterans that which it is perceived that everyone else has and veterans don't.

First of all, that is a false perception. Members of Congress and members of this staff don't have judicial review in the event of an injury sustained in the course of their work. That is just 1 of 70 or 80 examples.

Second, I would say that the issue of judicial review deserves the type of examination proposed by Judge Breyer in his testimony and in his statement; and that is a careful, close examination in line with other alternatives that also should be examined since the court system now is busily engaged in attempting to determine how to shift the burden in some areas to organizations and institutions other than the courts.

The second point that I would like to make is to take an attorney's perspective on section 211(a). Section 211(a) is a jurisdictional statute. It says in essence that there will be no judicial review of VA benefit decisions.

Now, if that is not what the Congress intended that to say and the court interpretations, which have in some cases now very, very strictly construed that provision, so that the bar is far broader than originally perceived, then the Senate and the Congress have the opportunity to modify that provision without getting into a lot of the detail that we have been involved in here today.

I thank you for the opportunity to appear.

Senator DECONCINI. Thank you, Mr. Ivers. You can be excused from the panel. If you would stay, we do have some questions we would like to submit to you and also ask you on the record.

[The prepared statement of Mr. Ivers appears on p. 490.]

Senator DECONCINI. I am now going to turn the hearings over to Counsel, and they will ask some questions. And Mr. Cushman, you can yield whenever you want to in the event that questions are directed to you; and I think they will be. Jon?

Mr. STEINBERG. Thank you very much, Senator DeConcini.

Mr. Weil, I wonder if I might address a question to you? In your testimony, your prepared statement, on page 5, you are discussing the use of courts of appeals versus district courts for the purposes of judicial review. You suggest that if the courts of appeals are to be utilized, then there should be development of a mechanism for factfinding, such as appointment of masters or remand to the district court when factfinding would be necessary.

We wonder if you would amplify a bit on that kind of a mechanism and why it would be necessary, given the scope of review provision that is in S. 11?

Mr. WEIL. You heard a court of appeals judge say that he feels that they are not very good at factfinding.

Mr. STEINBERG. I think at fact review, as a matter of fact, because of course they are not called upon to find facts in the court of appeals. But I think he was saying review of records on factual issues; I think that is what he was talking about.

Mr. WEIL. Yes. And where it is found that perhaps the BVA has not sufficiently looked at the facts, some mechanism is necessary; and if the courts of appeal are not very good at it, they should use a master such as for instance the Supreme Court uses in cases of original jurisdiction, or a remand to district courts, which are much more used to dealing with facts, it might be useful.

Mr. STEINBERG. So, this would be an alternative really to a remand to the BVA; that is what you are suggesting?

Mr. WEIL. Yes.

Mr. STEINBERG. All right, fine. Thank you. Mr. Burch and Mr. Bennett, we note that, as you indicated, this is your first appearance before this committee; and we especially want to offer a welcome to you and comment that we thought your statement was well reasoned and persuasive and concise. And we appreciate very much the effort that went into that.

You discuss in your statement a number of reasons why you believe that there will not be overcrowding in the courts if S. 11 were enacted; and we wonder if you might want to amplify on those reasons briefly at this point?

Mr. BURCH. I would ask Mr. Bennett, who is the General Secretary to our coalition, to respond to that.

Mr. STEINBERG. Please do.

Mr. BENNETT. Thank you, and thank you for the compliments, too, sir. Basically, the $500 fee limit, you know nearly every case will take a bit longer than can be justified by a $500 fee. So, the incentives for the attorney will be the contingency fee, which again, under this bill, is not actually a full contingency fee; but that will be the incentive.

Now, that means a lawyer only gets paid if he wins. That means that, if the Veterans' Administration BVA is doing that good a job, there aren't going to be that many good cases left over; and certainly, we know that the success rate of BVA has been very low.

We have talked to quite a few service officers who feel that most of the cases coming up are not very good cases. So, that is the basis of our belief that there will not be judicial overcrowding.

Mr. STEINBERG. Do you have a belief that the situation with respect to the Social Security fee study would not be reflective of what would occur with respect to the VA situation?

Mr. BENNETT. I think the problem with the Social Security fee study, which I have here, is that it is based on several very flawed assumptions.

The first assumption in this study is that anything over $75 is an excessive fee. Now, from everything I have seen, $75 is about the rockbottom minimum you can get these days anywhere. So, I think the assumption is totally flawed.

I think, second, what they have also done in computing this study is that they have taken the cases where there is a full contingency fee award and then divided the number of hours in to get an effective hourly rate. Now, when you do that, they have an appendix B—page 1 of 7 here—I see that actually 55 percent of all attorneys actually were underpaid, if you accept my assumption that $75 is the rockbottom minimum.

Further, because it is a contingency case, you only get paid if you win. You should really be getting some kind of multiple on an hourly rate to compensate for the risk. So, again, we have about a 20 percent ratio between $75 and $99, which certainly is within a zone of reasonableness.

The next problem with this study is that they have a broad range, between $100 and $199 per hour. Now, what is unreasonable and reasonable, I suspect, is somewhere between those two numbers; and we don't have a breakdown within this range, which is where the breakpoint is going to occur.

I think it is clear that, from this study, 4 percent of all attorneys have been overcompensated—the $200 and above; and somewhere up to 21 percent, and probably a lot less than that, may have been paid excessively to boot. And against that, as I have said, 55 percent clearly have been underpaid in the Social Security system.

I would also add that, as for the upper range, I spent a lot of time talking to people in the Social Security offices yesterday before I came down here, and again, they are doing scrutiny of the fee petitions. I read some of the horror stories contained in this study, and they said our office would never approve a situation like that.

I might add that in the last Social Security case I took, I haven't been paid 6 months later, after the decision had been rendered; and the effective contingency rate on the —because I did not submit for a full contingency—was about 13 to 14 percent.

Mr. **Steinberg**. Thank you very much. Tom, can you tell us why you think judicial review is particularly important to Vietnam veterans, given the makeup of your coalition?

Mr. **Burch**. Yes. I have to say that it is the POW, Agent Orange, and the judicial review that are the three driving issues in the Vietnam veterans movement. One of the difficulties is that, right now within the VA, even when we get legislation in Congress, we do not feel that it is being implemented in decisions.

And nothing is more appropriate than the Agent Orange legislation that we worked on with Senator Cranston in 1983 to get through this Congress. And to give an example, we had a bill that was only supposed to give about $5 million to some of the Agent Orange victims; and at the VA, they only helped 21 people.

By the way they have implemented the laws of Congress, these men are not getting even a very small bill. They are paying so small amounts under this legislation that they don't even put a budget request into it. It just goes out of general funds; it is so inconsequential.

So, the little thing that we got on this Agent Orange bill, they won't even implement it. We have to have some way to do it. It will not be a judicial overload.

The lawyers will not do these cases for the amount of fees involved. It is going to be more of a labor of love, and we just need to have some way to get this system straightened out. These men are not getting justice. The VA is not implementing the laws of Congress, not only by the regulations they are utilizing, but the way these regulations are being implemented.

It is very much a concern. We think it is directly related also to the Agent Orange problem. The men feel that it is very unfair; we asked Congress to remedy it.

Mr. **Steinberg**. Thank you. Dorothy Legarreta, we welcome you back here, being an old friend and a constituent of Senator Cranston's. Would you be able to submit for the record of the hearing the material that you mentioned with respect to your review of the radiation veterans' cases?

Dr. **LEGARRETA**. Yes.

Mr. **STEINBERG**. We would very much appreciate that.

[The information requested was not available at time of publication.]

Mr. **STEINBERG**. Mr. Cushman, could you describe for us the current status of the effort in Oregon to provide attorneys at State expense to represent claimants before the VA?

Mr. **CUSHMAN**. Yes. In that program, there was a final report recently issued. It showed that, of the 67 applicants that applied for representation under that program, 16 were denied representation by the State agency. The cases never got as far as an attorney.

Of the 50 referred to attorneys, 16 were closed by the attorneys for various reasons, such as the veteran died, or no legal basis for representation. That left 34 cases actually being handled by attorneys.

Right now, 28 of those claims—or 82 percent of the cases—are still in the process, pending development of evidence, pending decision of the Board of Veterans' Appeals, pending administrative review by the Board of Veterans' Appeals denials in, I believe, two of the cases.

In 10 percent of those cases, the veterans have prevailed in the case, which appears to be pretty good. It will be interesting to see the results of these 82 percent of the cases, when they are ultimately decided.

Mr. **STEINBERG**. Is there a current paper that has been prepared summarizing these activities that we might place in the record of the hearing?

Mr. **CUSHMAN**. Yes, I have a copy of the report.

Mr. **STEINBERG**. If you would like us to copy that, if that is your only copy, we will be glad to do that.

Mr. **CUSHMAN**. Yes, I will submit this for the record.

[Mr. Cushman furnished the information which appears on p. 431.]

Mr. **STEINBERG**. We appreciate that. Dorothy, is NARS providing legal assistance to radiation-exposed veterans at this point in connection with any VA claims, other than of course the major case that you have cited?

Dr. **LEGARRETA**. No, we are not providing legal counsel. We only refer people who ask us for an attorneys list. We just mail them the list, and they take it from there.

Mr. **STEINBERG**. I see.

Dr. **LEGARRETA**. We are not in a position to provide either pro bono or paid legal representation.

Mr. **STEINBERG**. Mr. Cushman, do you have a lawsuit pending with respect to challenging preclusion of judicial review?

Mr. **CUSHMAN**. Veterans Due Process?

Mr. **STEINBERG**. Yes.

Mr. **CUSHMAN**. No, not at this point in time.

Mr. **COOPER**. Why do you ask Mr. Cushman that question, Counsel? I wrote the testimony.

Mr. **STEINBERG**. Excuse me. If you would please observe the proper rules of the hearing, you will get an opportunity to have a say.

What I would propose to do, Tony, if that would be agreeable to you, since these witnesses were told they would have 5 minutes and they were only given 3 minutes in order to use Senator DeConcini's time most effectively—and with Mr. Ivers' indulgence because we would like to ask him a few questions—I would like to give each of the witnesses 2 more minutes to make any points that they wish to make to the committee at this point. So, then each of you will have had your 5 minutes.

Mr. PRINCIPI. Jon, I certainly would have no objection to that. I would just like to propound one question, if I might, to followup on some of your questions at this time, before they proceed.

Mr. STEINBERG. That would be fine.

Mr. PRINCIPI. I will be very, very brief; but I do want to echo your comments, Jon, in welcoming the witnesses before the hearing. It is nice to have Tom, whom I have known for quite some time, before the hearing, and Dorothy.

There is a difference of opinion, of course, between S. 11 and S. 2292. I think the important point is that there is legislation pending; and hopefully, through the legislative process, we will have a product that will be acceptable. And in the final analysis, I think that is what we want to happen.

Mr. Bennett, I would like to propound a question to you. You may have heard Judge Breyer's testimony that the standard for judicial review of questions of fact, as proposed in S. 11, is so narrow as to virtually, in his opinion, make it impossible for veterans to prevail before the court of appeals.

If the standard remains in the bill as currently pending, can you support that provision?

Mr. BENNETT. Thank you. We have, of course, in our testimony excepted to that provision. We would support S. 11 in any event, since it is the best thing out there. We would certainly hope that provision would be changed. The only reason we didn't come out a lot harder against it is that it struck me while reading it over—is that hopefully some judge out there would say—they can't possibly mean that, so I will construe it a little differently. [Laughter.]

Mr. PRINCIPI. Mr. Weil, could you please comment on that provision?

Mr. WEIL. We believe that the provisions in S. 11 are far too stringent.

Mr. PRINCIPI. Thank you. And thank you again for your testimony. It has been very helpful. Thank you, Jon.

Mr. STEINBERG. Thank you, Tony. I might make just a brief followup comment just for the benefit of our witnesses and those with us that it is interesting to have a U.S. Circuit Court judge—and a district judge as well—tell us that we actually have succeeded in crafting a standard of review which indeed would be very narrow because we have had many people, on the other hand, tell us that no matter what is written in the statute, you are going to have judges coming in and reviewing the facts from the outset and giving no deference to the finding of the administrative agency.

And this is, of course, the first authoritative piece of testimony that we have had as to how that standard would be interpreted. They have never seen that standard before, because I don't believe it appeared anywhere before except in three bills that have passed the U.S. Senate.

But I would like to amplify that it was the intention of this committee, under Senator Simpson's chairmanship—which is when that standard was created—to create only a very narrow window.

And the reason for that was because it was felt that the possibility of judicial review to remedy truly egregious fact determinations would have an extremely beneficial effect on the adjudications by the Board of Veterans' Appeals, that the possibility that such a determination could be overturned after one remand—and S. 11 requires a remand to the Board—would itself significantly affect the course of adjudications before the Board of Veterans' Appeals.

And it was the position of this committee at that time, when this was first created in 1981—and it continues to be the position of Senator Cranston and the seven members of this committee who have cosponsored S. 11—that the most ideal result is to get a fair determination, first before the local agency of jurisdiction down at the regional office level; that is the most desirable result.

The second most desirable result is to get it, if you request a hearing there at the local level; and third, to win at the BVA. The least desirable result is to have to go to court to prevail, but that avenue should be there.

So, there was a determination made to try to come up with a very, very narrow window in order to try to spread some more daylight into the system and to provide some more accountability for the system. It is clear, of course, that if the bill were enacted in that form, and it turned out to be unreasonably restrictive, that Congress could come back and take another look at it.

But the feeling was and is, for those who support S. 11, that that is a good place to start; and let's see what kind of effect, which we think would be beneficial, would be had on the BVA system. I thank you for bearing with that clarification.

Mr. BURCH. If you would just give some consideration to that word "utterly."

Mr. STEINBERG. Let me now, in the order in which you testified, ask you if you wish to take 2 additional minutes. We would be glad to have you amplify any points that you would wish to make at this time. If you wish to yield back your time, we would be glad to have it back as well. Mr. Weil?

Mr. WEIL. I will yield back the time.

Mr. STEINBERG. That is very gracious of you. Thank you.

Mr. BENNETT. Both of you Counsel, we can yield back.

Mr. STEINBERG. All right. Dorothy, would you like 2 additional minutes?

Dr. LEGARRETA. I will yield my time to Mr. Cooper.

Mr. COOPER. That means I have 4 minutes.

Mr. STEINBERG. Mr. Cushman, you can proceed with your 4 minutes in any fashion that you wish.

Mr. CUSHMAN. I yield my time to Sid Cooper.

Mr. STEINBERG. Mr. Cooper, we welcome your testimony.

Mr. COOPER. Thank you, sir. None of this would have surprised Senator Huey Long of Louisiana, who in 1933, when these infamous laws were passed, said: "How long are we going to sit here and see people turned out of hospitals and starved to death by these little two-by-four bureaucrats exercising more power than the 96 members of the U.S. Senate, instead of being men standing up on two legs and two feet and running this Government for the people of the United States?"

We are authorizing some bureaucrat to prescribe limits and rules under which he will work and then permit him to go off and do what he pleases. That is the trouble with the whole "plague, take-it" system, and that is the reason why veterans are in the fix they find themselves in today.

The Veterans' Administration has been uniquely placed above the law by ill-considered and unconstitutional laws which insulate its decision from court review. Moreover, the VA vigorously asserts that it need not account to anyone for its actions or procedures.

What do you think Senator Long would have said about VA bureaucrats telling a Federal court that if it denied a woman's claim on account of gender, that it was none of the court's business? Or if it wished to deny claims on account of race, that it wished none of the court's business? Or if it wished to deny claims on account of color, that it was likewise none of the court's business?

What should the Congress say to that? Is that what Congress intended? More importantly, what is Congress going to do about it? Congress spawned this bureaucratic monster; now it is up to Congress to bring it to heel, and quick—before it consumes us all.

What do you think Huey Long would have said to The American Legion, the DAV, and the VFW, purportedly representing millions of veterans, whose leadership routinely comes to Washington telling Congress, "Our members are happy to be second-class citizens and denied legal rights, which are accorded traitors, spies, criminals and perverts"?

What would the American people say about a 55-year-old congressional practice collaborated in by the established veteran leadership, of hoodwinking American youngsters into our Armed Forces and then, if injured, strip them of their constitutional rights, consigning them to a lifetime of degradation, despair, and homelessness? If there must be truth in lending and advertising, why not truth in recruiting?

What would the American people think about a leadership which sold its members out on a cross of free services and then proceeded to lie about it? Senator Long and the American people would call it a cowardly betrayal of the veteran and a national disgrace.

If their members only knew, that leadership would be run out of town on a rail, consequently the leadership in its own defense dare not print a single word about their betrayal of the American veteran.

What would veterans think about a leadership which permitted the VA to haul 145,000 veterans into court, but won't permit veterans to return the favor or even plead a defense? One side of their mouth contending that the courts are overcrowded when veterans wish to enter; on the other side, saying that it is not overcrowded when the VA wishes to enter. What double-dealing treachery is this?

What should The American Legion, DAV, and VFW members think about a system where the bureaucrat is king and can do no wrong? Meanwhile, veterans lose 88 percent of the time, no matter how good a case they may have. A system which permits veterans no cross examination or subpoena power, where a veteran specialist doctor is always wrong, and the VA's general practitioner is always right.

What would veterans think about a quota system which permits the VA to do anything it wishes with impunity, such as panel rigging, deck stacking, panel shopping, courtesy decisions, et cetera? And when the bureaucrats are nailed, assert that the rules and regulations permit them to do it?

How can The American Legion, DAV, and VFW have the nerve to tell the Congress and the American people that they represent veterans on the issue of judicial review? More importantly, how could this Congress believe it?

What about some of the egregious decisions, like the case of the institutionalized insane veteran whose benefits were cut off?

Mr. **Steinberg**. Mr. Cushman, would you please conclude in 30 seconds?

Mr. **Cooper**. I will sum up. He doesn't have to sum up, but I do, if you want me to. But I would like the rest of it to be put in the record, if I may?

Mr. **Steinberg**. We will be glad to have your prepared statement for the record.

Mr. **Cooper**. In conclusion, Veterans Due Process submits that Congress must consider truth in recruiting, just as there is truth in lending or advertising; a fair and impartial forum to adjudicate veterans' claims; elimination of the blackmail and intimidation clause; veterans' publications must be open to opposing views; the Financial Secrecy Act must be repealed; attorneys must be permitted access to the VA adjudication system; VA rules, regulations, and operating practices must be subject to the Administrative Procedures Act; De novo review at U.S. District Court level must be allowed, there being no satisfactory alternative; grass roots organizations, such as Veterans Due Process, must be afforded the opportunity to speak by matter of right, not sufferance at congressional hearings.

Congress and the American people should be reminded of what the Father of our country, George Washington, said: "How the war veteran is perceived to be treated will directly affect the willingness of future generations to make those same sacrifices."

Surely the right to a day in court is not too much to ask from the American people and its Congress. The conscience of a Nation demands it. Thank you. [Applause.]

Mr. **Steinberg**. Thank you very much.

We would like to thank all the panelists for bearing with us through this very long morning; and we are sorry for the interruptions. Now, I would ask if Mr. Ivers would come back forward so that we might ask a few questions of him?

Mr. **Cushman**. Counsel, you asked for a copy of this Oregon Attorney Services Summary. I would like to give that to you, and I would also like, if I could, to send you a written Veterans Due Process report concerning the Oregon Attorney Services Program and why we believe it is not, and never was, a meaningful indicator of what those who caused the passage of the law, would like to have seen happen. Veterans Due Process caused the passage of the Oregon Attorney Services law.

Mr. **Steinberg**. Yes, we are aware of that. We would be glad to have that submission. Thank you.

Mr. **Cushman**. Thank you very much.

Mr. **Steinberg**. Is the complete report available, Mr. Cushman?

Mr. **Cushman**. This is the complete recent report.

[Mr. Cushman furnished the information which appears on p. 440.]

Mr. **Steinberg**. Don, we appreciate very much your bearing with us, and we know it has been a long day; but there are a couple of points that we would like to seek some clarification on if you could help us.

I think you indicated that you felt that the situation that presently exists in terms of the state of the law under 211(a) and challenges to regulations needs clarification. What is the VA's position with respect to how that clarification should be cast?

Should challenges to regulations, whether arising directly out of benefit cases or otherwise, be able to be made in the Federal courts, in terms of the VA's policy position?

Mr. **Ivers**. Jon, our current position is limited by the Supreme Court's interpretation of 211(a), the most recent being in the *McKelvey* and *Traynor* cases. Maybe I will expand a little bit on what I said before on 211(a).

From a lawyer's point of view, 211(a) is a jurisdictional statute. Our attorneys—the ones who represent us—would be remiss in their duty if they did not plead a jurisdictional statute when it is available to them. 211(a) has traditionally been pled by the VA in any court proceeding.

Four or five years ago, courts began to take notice of 211(a) and, in fact, we then got a split in the circuits on what the effect or impact of 211(a) is; and right now, the effect of 211(a) is to permit review of constitutional issues and review of the Administrator's actions with respect to the legality of statutes (over which he does not exercise any control), or under statutes which do not govern the VA. We are bound by that.

Mr. **Steinberg**. And you are not recommending any affirmative change in 211(a) with respect to that latter area?

Mr. **Ivers**. I am not recommending a change at this time, but what I said and what I hope was understood was that, if we are going to examine the issue of judicial review on a rational basis, and not come up here once every 1 or 2 years and go through one of these things, then one of the things that should be examined is: What was 211(a) originally intended to do, and is it still doing it? And if it is not, then let's address that.

Mr. **Steinberg**. All right. With respect to the process that would be proposed by S. 2292, if paid attorneys were able to raise challenges to regulations and General Counsel opinions before the BVA, do you believe that that would tend to encourage the raising of such legal challenges before the BVA in order for a paid attorney to be able to enter the case and make whatever arguments they wished to make?

Mr. **Ivers**. Yes. Under those circumstances, I see no reason to have that provision permit raising those issues before the BVA. Who needs it? If you are going to raise them, raise them in court.

They are the appropriate branch of the Government that is equipped to deal with those questions.

Mr. STEINBERG. You would say that that is an unnecessary layer, in other words?

Mr. IVERS. I think that one is. Yes.

Mr. STEINBERG. Could you describe for us the process that you go through in your office to issue a General Counsel opinion which would be considered a precedent opinion?

Mr. IVERS. We issue a General Counsel opinion in response to questions from the Board of Veterans' Appeals or other Agency elements. The chairman and the members of the various panels of the Board, I am sure, determine that there is either a disagreement or there is not a clear legal position available with respect to an interpretation of the statute or regulation.

They then ask us for an opinion. We then staff it; we review it; and we issue the opinion.

Mr. STEINBERG. And approximately how long does that take? How many lawyers would be involved in the average such opinion in your office?

Mr. IVERS. Obviously, it would depend on the nature of the question; but I would say the entire review process and the issuance of opinion, again depending on the complexity of the issue, would take anywhere from 30 to 90 days, possibly longer at times.

Mr. STEINBERG. And would involve the work of several attorneys?

Mr. IVERS. Yes.

Mr. STEINBERG. And by the time the opinion is prepared, goes through that process, and reaches your desk, and you sign it, you are obviously quite confident that it reaches the correct result?

Mr. IVERS. I read them; and if I have any question, I send them back, and we go over them again.

Mr. STEINBERG. If the Board of Veterans' Appeals were given the authority to overturn—disagree with—such opinions and did so, I take it the chances would be fairly good that your view would be that that matter ought to be taken to court and resolved in court?

Mr. IVERS. We would have to have some place to go to resolve the matter. The Administrator wouid then have to be represented. It would set up a whole other structure of litigation, if you will. I am not saying it would have to go to court, but it has to have somewhere to go to be resolved.

You now have a different legal opinion from two bodies internal to the same organization.

Mr. STEINBERG. No, the BVA decision could be made definitive and conclusive, which I believe was the intent of S. 2292, that the BVA would in essence be able to disagree and could make a determination.

At the same time, I believe the bill then provides for an avenue of appeal from that BVA determination to the Federal circuit. Is that correct, Tony? If a General Counsel opinion or regulation were invalidated and the VA wished to appeal that, that could go to the Federal circuit?

Mr. PRINCIPI. Yes.

Mr. STEINBERG. What I was trying to get at is that it would be quite likely that the Administrator, whom you advise and represent on many occasions—as you are this morning—would seek to avail itself of that review in Federal court.

Mr. **Ivers**. I am sure there would be occasions when we would find ourselves in that position. Yes.

I am not sure, but I believe that a situation like that may be more or less unprecedented in the Government. I am not aware of any other similar structure in any other agency.

Mr. **Steinberg**. I believe that that is essentially correct and that the Administrative Conference, in its general review of that area, recommended strongly against such a situation, taking the position that the adjudication entity should be bound by the Agency's policy issuances.

But we certainly should open our minds to new approaches and not rule them out merely because someone else hasn't thought of it before or decided to do it before.

Mr. **Ivers**. I would like to go on record on behalf of the VA as saying that we welcome the opportunity to have two different pieces of legislation here to consider and to debate. Even though we are not in agreement with either one of them, we certainly do welcome an opportunity for some debate on something more than just a single bill.

Mr. **Steinberg**. That is perhaps the one thing that we are in agreement on this morning.

Mr. **Ivers**. That may be the only thing, Jon.

Mr. **Steinberg**. Do you have any way of estimating, or could you attempt to do this for the record, what the impact might be in workload on the BVA under S. 2292 in terms of challenges to regulations, and what the workload might be on your office insofar as representing the Agency regulation or your opinion, if it is challenged before the BVA? Have you been able to give any thought to that?

Mr. **Ivers**. We have given a little thought to it, but I think I would rather submit that for the record; and I am not sure that we can give you any kind of accurate determination, but we have explored that to a limited degree.

Mr. **Steinberg**. If you would look at the workloads in each place and give us some indication of what might be entailed and what cost would be placed on that, that would be helpful to us.

And then finally, if you could provide for the record a list of the number of suits in which regulations or GC opinions have been challenged in court in each of the last 10 fiscal years, and give us the case names and citations and a description of the case holding, I think that would be a useful thing for us to include in the record.

Mr. **Ivers**. Including constitutional challenges?

Mr. **Steinberg**. Yes. That would be helpful. I think you have most of that already prepared.

Mr. **Ivers**. Yes.

Mr. **Steinberg**. If you could do that, that would be very helpful. Tony, I would like to yield to you for any questions you may have.

[Subsequently, the Veterans' Administration furnished the information which appears on p. 511.]

Mr. **Principi**. Thank you, Jon. I just have one question to ask at this time, and we have a number that we would like to submit for the record.

Mr. **Ivers**. I will be glad to answer them.

Mr. **Principi**. Fine. On page 17 of your statement, you indicate that under S. 2292 if a veteran challenged a regulation, the Administrator would be placed in a directly adversarial role vis-a-vis veterans a situation that should never be permitted.

In light of the challenges already available to veterans under *Robison* and *Traynor*, and in light of the fact that the Administrator does, in fact, sue veterans for money owed and overpayments, do you really think that we should consider this issue of adversarial roles a very serious problem?

Mr. **Ivers**. Yes, I do, Tony, at the administrative level. And 2292 presents this type of a situation before the Board of Veterans' Appeals which, prior to this time, there has not been an adversarial relationship between the Administrator of the VA and the veteran.

If there is to be an adversarial relationship developed directly in this manner, then I feel that the appropriate place to have it would be in the court. Again, obviously we oppose that provision.

I would also like to comment just briefly, since it has been brought up several times here, on the ability of the VA to take a veteran to court to recover an overpayment or recover a debt.

We went into that fairly extensively in the House hearings on H.R. 585, and I would commend our testimony on that to you; but I would say that the VA process for attempting to collect or reconcile an overpaypment or a debt is thorough, is extensive and is lengthy.

And the courts are used only as a last resort and only after we have been unable through any other means available—either to us or to the veteran—to resolve that case, we then have a duty—that is the taxpayer's money—we have a duty to make whatever effort is available to us to attempt to recover it. And that is the point at which the cases go into court.

At that point, the administrative rules go by the boards. I don't think it has been raised here, but there has been an allegation in the past—and it has been perpetuated by some of the proponents of judicial review—that we then take a veteran to court and assert that the $10 attorney fee limit applies, which is just totally false.

Once we are forced to take a veteran to court to recover moneys wrongfully distributed or a debt incurred by the veteran with respect to any of our programs that we administer for the Federal Government, then as I said all the administrative rules are out the window. We are then bound by the court rules, as is the veteran.

Mr. **Principi**. Thank you. Thank you, Jon. I have nothing further.

Mr. **Steinberg**. Don, thank you for bearing with us and for returning to the table. This hearing stands adjourned.

[Whereupon, at 12:40 p.m., the hearing was adjourned.]

100TH CONGRESS
1ST SESSION

S. 11

To amend title 38, United States Code, to establish certain procedures for the adjudication of claims for benefits under laws administered by the Veterans' Administration; to apply the provisions of section 553 of title 5, United States Code, to rulemaking procedures of the Veterans' Administration; to provide for judicial review of certain final decisions of the Administrator of Veterans' Affairs; to provide for the payment of reasonable fees to attorneys for rendering legal representation to individuals claiming benefits under laws administered by the Veterans' Administration; and for other purposes.

IN THE SENATE OF THE UNITED STATES

JANUARY 6, 1987

Mr. CRANSTON (for himself, Mr. SIMPSON, Mr. MATSUNAGA, Mr. DECONCINI, Mr. MITCHELL, Mr. ROCKEFELLER, Mr. STAFFORD, Mr. KENNEDY, Mr. COHEN, Mr. CHILES, Mr. DURENBERGER, Mr. GORE, Mr. PRESSLER, Mr. SASSER, Mr. HEINZ, Mr. KERRY, Mr. WILSON, Mr. SIMON, Mr. LEAHY, Mr. LEVIN, Mr. SARBANES, Mr. RIEGLE, Mr. MELCHER, Mr. JOHNSTON, Mr. BURDICK, and Mr. BINGAMAN) introduced the following bill; which was read twice and referred to the Committee on Veterans' Affairs

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A BILL

To amend title 38, United States Code, to establish certain procedures for the adjudication of claims for benefits under laws administered by the Veterans' Administration; to apply the provisions of section 553 of title 5, United States Code, to rulemaking procedures of the Veterans' Administration; to provide for judicial review of certain final decisions of the Administrator of Veterans' Affairs; to provide for the payment of reasonable fees to attorneys for rendering legal representation to individuals claiming benefits under laws administered by the Veterans' Administration; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) this Act may be cited as the "Veterans' Administration Adjudication Procedure and Judicial Review Act".

(b) Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 38, United States Code.

TITLE I—ADJUDICATION PROCEDURES

SEC. 101. (a) Chapter 51 is amended by adding at the end of subchapter I the following new section:

"§ 3007. Burden of proof; benefit of the doubt

"(a) Except when otherwise provided by the Administrator in accordance with the provisions of this title, a claimant for benefits under laws administered by the Veterans' Administration shall have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded. The Administrator shall assist a claimant in developing the facts pertinent to his or her claim.

"(b) When, after consideration of all evidence and material of record in any proceeding before the Veterans' Administration involving a claim for benefits under laws administered by the Veterans' Administration, there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of such claim, the benefit of the doubt in resolving each such issue will be given to the claimant, but nothing in this section shall be construed as shifting from a claimant to the Administrator the burden described in subsection (a) of this section.".

(b)(1) The table of chapters at the beginning of title 38, United States Code, and the table of chapters at the beginning of part IV of such title are each amended in the item relating to chapter 51 by striking out "Applications" and inserting in lieu thereof "Claims".

(2) The heading of such chapter is amended to read as follows:

"CHAPTER 51—CLAIMS, EFFECTIVE DATES, AND PAYMENTS".

(c)(1) The table of sections at the beginning of such chapter is amended in the item relating to subchapter I by striking out "APPLICATIONS" and inserting in lieu thereof "CLAIMS".

(2) The heading of subchapter I of such chapter is amended to read as follows:

"Subchapter I—Claims".

(d) The table of sections at the beginning of such chapter is amended by adding after the item relating to section 3006 the following new item:

"3007. Burden of proof; benefit of the doubt.".

SEC. 102. Section 3311 is amended by adding at the end the following new sentences: "Subpenas authorized under this section shall be served by any individual authorized by the Administrator by (1) delivering a copy thereof to the individual named therein, or (2) mailing a copy thereof by registered or certified mail addressed to such individual at such individual's last known dwelling place or principal place of business. A verified return by the individual so serving the subpena setting forth the manner of service, or, in the case of service by registered or certified mail, the return post office receipt therefor signed by the individual so served shall be proof of service.".

SEC. 103. Section 4001 is amended—

(1) in the second sentence of subsection (a), by inserting before the period at the end of such sentence "in a timely manner"; and

(2) by adding at the end thereof the following new subsection:

"(d) The Chairman of the Board shall submit a report to the appropriate committees of the Congress, not later than December 31, 1988, and annually thereafter, on the experience of the Board during the prior fiscal year together with projections for the fiscal year in which the report is submitted and the subsequent fiscal year. Such report shall contain, as a minimum, information specifying the number of cases appealed to the Board during the prior fiscal year, the number of cases pending before the Board at the beginning and end of such fiscal year, the number of such cases which were filed during each of the 24 months preceding the prior fiscal year and the then current fiscal year, respectively, the average length of time a case was before the Board between the time of the filing of an appeal and the disposition during the prior fiscal year, and the number of members of, and the professional, administrative, clerical, stenographic, and other personnel employed by, the Board at the end of the prior fiscal year. The projections for the current fiscal year and subsequent fiscal year shall include, for each such year, estimates of the number of cases to be appealed to the Board and an evaluation of the Board's ability, based on existing and projected personnel levels, to ensure timely disposition of such appeals as provided for by subsection (a) of this section.".

SEC. 104. Section 4003 is amended—

(1) in subsection (a), by inserting a comma and "after notice of such additional information is furnished to the claimant and the claimant is provided an oppor-

tunity to be heard in connection with such information," after "concerned"; and

(2) in subsection (b)—

(A) by striking out "When" and inserting in lieu thereof "(1) Except as provided in paragraph (2), when";

(B) by inserting a comma and "after notice of such additional information is furnished to the claimant and the claimant is provided an opportunity to be heard in connection with such information," after "concerned"; and

(C) by adding at the end thereof the following new paragraph:

"(2) When, without the vote of a temporary member designated under section 4001(c)(1) of this title or the vote of an acting member designated under section 4002(a)(2)(A)(ii) of this title, a section would be evenly divided, such member shall not vote.".

SEC. 105. Section 4004 is amended—

(1) in subsection (a)—

(A) by striking out "involving" in the first sentence and inserting in lieu thereof "for"; and

(B) by inserting before the period at the end of the second sentence "after affording the claimant an opportunity for a hearing and shall be based exclusively on evidence and material of record in the proceeding and on applicable provisions of law";

(2) by striking out subsection (b) and inserting in lieu thereof the following:

"(b)(1) Except as provided in paragraph (2) of this subsection, when a claim is disallowed by the Board, it may not thereafter be reopened and allowed and no claim based upon the same factual basis shall be considered.

"(2) Following such a disallowance, the Board (directly or through the agency of original jurisdiction, as described in section 4005(b)(1) of this title)—

"(A) when new and material evidence is secured, shall, and

"(B) for good cause shown, may authorize the reopening of a claim and a review of the Board's former decision.

"(3) A judicial decision under subchapter II of chapter 71 of this title, upholding, in whole or in part, the disallowance of a claim shall not diminish the Board's authority set forth in paragraph (2) of this subsection to authorize the reopening of a claim and a review of the former decision."; and

(3) by striking out subsection (d) and inserting in lieu thereof the following:

"(d) After reaching a decision in a case, the Board shall promptly mail notice of its decision to the claimant and the claimant's authorized representative, if any, at the last known address of the claimant and at the last known address of the claimant's authorized representative, if any. Each decision of the Board shall include—

"(1) a written statement of the Board's findings and conclusions, and reasons or bases therefor, on all material issues of fact and law and on matters of discretion presented on the record; and

"(2) an order granting appropriate relief or denying relief.".

SEC. 106. Section 4005(d)(5) is amended by striking out "will base its decision on the entire record and".

SEC. 107. Section 4009 is amended by adding after subsection (b) the following new subsection:

"(c) Whenever there exists in the evidence of record in an appeal case a substantial disagreement between the substantiated findings or opinions of two physicians with respect to an issue material to the outcome of the case, the Board shall, upon the request of the claimant and after taking appropriate action to attempt to resolve the disagreement, arrange for an advisory medical opinion in accordance with the procedure prescribed in subsection (b) of this section. If the Board denies the request of such claimant for such an opinion, the Board shall prepare and provide to the claimant and the claimant's authorized representative, if any, a statement setting forth the basis for its determination. Actions of the Board under this subsection, including any such denial, shall be final and conclusive, and no other official or any court of the United States shall have the power or jurisdiction to review any aspect of any such decision by an action in the nature of mandamus or otherwise, the provisions of subchapter II of chapter 71 of this title to the contrary notwithstanding.".

SEC. 108. (a) Chapter 71 is further amended by adding at the end thereof the following new sections:

"§ 4010. Adjudication procedures

"(a) For purposes of conducting any hearing, investigation, or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, the Administrator may administer oaths and affirmations, examine witnesses, and receive evidence.

"(b) Any oral, documentary, or other evidence, even though inadmissible under the rules of evidence applicable to judicial proceedings, may be admitted in a hearing, investigation, or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, but the Administrator, under regulations which the Administrator shall prescribe, may provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

"(c)(1) In the course of any proceeding before the Board, any party to such proceeding or such party's authorized representative shall be afforded opportunity—

"(A) to examine and, on payment of a fee prescribed pursuant to section 3302(b) of this title (not to exceed the direct cost of duplication), obtain copies of the contents of the case files and all documents and records to be used by the Veterans' Administration at such proceeding;

"(B) to present witnesses and evidence, subject only to such restrictions as may be set forth in regulations which the Administrator shall prescribe, pursuant to subsection (b) of this section, as to materiality, relevance, and undue repetition;

"(C) to make oral argument and submit written contentions, in the form of a brief or similar document, on substantive and procedural issues;

"(D) to submit rebuttal evidence;

"(E) to present medical opinions and request an independent advisory medical opinion pursuant to section 4009(c) of this title; and

"(F) to serve written interrogatories on any person, including any employee of the Veterans' Administration, which interrogatories shall be answered separately and fully in writing and under oath unless written objection thereto, in whole or in part, is filed with the Administrator by the person to whom the interrogatories are directed or such person's representative.

"(2) The fee provided for in paragraph (1)(A) of this subsection may be waived by the Administrator, pursuant to regulations which the Administrator shall prescribe, on the basis of the party's inability to pay or for other good cause shown.

"(3) In the event of any objection filed under paragraph (1)(F) of this subsection, the Administrator shall, pursuant to regulations which the Administrator shall prescribe establishing standards consistent with standards for protective orders applicable in the United States District Courts, evaluate such objection and issue an order (A) directing that, within such period as the Administrator shall specify, the interrogatory or interrogatories objected to be answered as served or answered after modification, or (B) indicating that the interrogatory or interrogatories are no longer required to be answered.

"(4) If any person upon whom interrogatories are served under paragraph (1)(F) of this subsection fails to answer or fails to provide responsive answers to any such interrogatories within 30 days after service or such additional time as the Administrator may allow, the Administrator shall, upon a statement or showing by the party who served such interrogatories of general relevance and reasonable scope of the evidence sought, issue a subpena under section 3311 of this title (with enforcement of such subpena to be available under section 3313 of this title) for such person's appearance and testimony on such interrogatories at a deposition on written questions, at a location within 100 miles of where such person resides, is employed, or transacts business.

"(d) In the course of any hearing, investigation, or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, an employee of the Veterans' Administration may at any time disqualify himself or herself, on the basis of personal bias or other cause, from adjudicating the claim. On the filing by a party in good faith of a timely and sufficient affidavit averring personal bias or other cause for disqualification on the part of such an employee, the Administrator shall determine the matter as a part of the record and decision in the case.

"(e) The transcript or recording of testimony and the exhibits, together with all papers and requests filed in the proceeding, and the decision of the Board (1) shall constitute the exclusive record for decision in accordance with section

4004(a) of this title, (2) shall be available for inspection by any party to such proceeding, or such party's authorized representative, at reasonable times and places, and (3) on the payment of a fee prescribed under section 3302(b) of this title (not to exceed the direct cost of duplication), shall be copied for the claimant or such claimant's authorized representative within a reasonable time. Such fee may be waived by the Administrator, pursuant to regulations which the Administrator shall prescribe, on the basis of the party's inability to pay or for other good cause shown.

"(f) Notwithstanding section 4004(a) of this title, section 554(a) of title 5, or any other provision of law, adjudication and hearing procedures prescribed in this title and in regulations prescribed by the Administrator under this title for the purpose of administering veterans' benefits shall be exclusive with respect to hearings, investigations, and other proceedings in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration.

"§ 4011. Notice of procedural rights

"In the case of any disallowance, in whole or in part, of a claim for benefits under laws administered by the Veterans' Administration, the Administrator shall, at each procedural stage relating to the disposition of such a claim, beginning with disallowance after an initial review or determination, and including the furnishing of a statement of the case and the making of a final determination by the Board, provide to the claimant and such claimant's authorized representative, if any, written notice of the procedural rights of the claimant. Such notice shall be on such forms as the Administrator shall prescribe by regulation and shall include, in easily understandable language, with respect to proceedings before the Veterans' Administration, (1) descriptions of all subsequent procedural stages provided for by statute, regulation, or Veterans' Administration policy, (2) descriptions of all rights of the claimant expressly provided for in or pursuant to this chapter, of the claimant's rights to a hearing, to reconsideration, to appeal, and to representation, and of any specific procedures necessary to obtain the various forms of review available for consideration of the claim, and (3) such other information as the Administrator, as a matter of discretion, determines would be useful and practical to assist the claimant in obtaining full consideration of the claim.".

(b) The table of sections at the beginning of such chapter is amended by adding after the item relating to section 4009 the following new items:

"4010. Adjudication procedures.
"4011. Notice of procedural rights.".

SEC. 109. (a) In order to evaluate the feasibility and desirability of alternative methods of (1) assuring the resolution of claims before the Administrator of Veterans' Affairs for benefits under laws administered by the Veterans' Administration as promptly and efficiently as feasible following the filing of a notice of disagreement pursuant to section 4005 (as amended by section 106 of this Act) or 4005A of title 38, United States Code, and (2) affording claimants the opportunity for a hearing before or review by a disinterested authority at a location as convenient and on as timely basis as possible for each claimant, the Administrator is authorized to conduct a study, commencing not more than 1 year after the date of the enactment of this Act, for a period of 24 months, involving either or both of the alternative methods described in subsection (b) of this section for resolution of claims.

(b)(1) In not more than three geographic areas, the Administrator is authorized to provide an intermediate-level adjudication process whereby each claimant may, within the time afforded such claimant under paragraph (3) of section 4005(d) or 4005A(b) of title 38, United States Code, to file an appeal, request a de novo hearing at the agency of original jurisdiction (as described in section 4005(b)(1) of such title) before a panel of three Veterans' Administration employees, each of whose primary responsibilities include adjudicative functions but none of whom shall have previously considered the merits of the claim at issue. Following such hearing, such panel shall render a decision and prepare a new statement of the case in accordance with the requirements of paragraphs (1) and (2) of section 4005(d) of such title. Such new statement of the case shall, for all purposes relating to appeals under chapter 71 of such title, be considered to be a statement of the case as required by paragraph (1) of such section 4005(d).

(2) In not more than three other geographic areas, the Administrator is authorized to provide for an enhanced schedule of visits, on at least a quarterly basis each year, by a panel or panels of the Board of Veterans' Appeals to conduct formal recorded hearings pursuant to section 4002 of such title in such areas.

(c) Not later than 6 months after the completion of such study, the Administrator shall report to the Congress on the results thereof, including an evaluation of the cost factors associated with each alternative studied and with any appropriate further implementation thereof, the impact on the workload of each regional office involved in such study, and the impact on the annual caseload of the Board of Veterans' Appeals resulting from each alternative studied, together with any recommendations for administrative or legislative action, or both, as may be indicated by such results.

SEC. 110. Section 3010(i) is amended—

(1) by inserting "(1)" after "(i)"; and

(2) by adding at the end the following new paragraph:

"(2) Whenever any disallowed claim is reopened and thereafter allowed on the basis of new and material evidence in the form of official reports from the proper service department, the effective date of commencement of the benefits so awarded shall be the date on which an award of benefits under the disallowed claim would have been effective had the claim been allowed on the date it was disallowed.".

TITLE II—VETERANS' ADMINISTRATION RULE MAKING

SEC. 201. (a) Subchapter II of chapter 3 is amended by adding at the end the following new section:

"§ 223. Rule making

"Notwithstanding the provisions of subsection (a)(2) of section 553 of title 5, the promulgation of rules and regulations by the Administrator, other than rules or regulations pertaining to agency management or personnel or to public property or contracts, shall be subject to the requirements of section 553 of title 5.".

(b) The table of sections at the beginning of such chapter is amended by adding after the item relating to section 222 the following new item:

"223. Rule making.".

TITLE III—JUDICIAL REVIEW

SEC. 301. Section 211(a) is amended by striking out "sections 775, 784" and inserting in lieu thereof "sections 775 and 784 and subchapter II of chapter 71 of this title".

SEC. 302. (a) Chapter 71 is further amended—

(1) by inserting after the table of sections the following new heading:

“Subchapter I—General”;

and

(2) by adding at the end thereof the following new subchapter:

“Subchapter II—Judicial Review

“§ 4025. Right of review; commencement of action

“(a) For the purposes of this chapter—

“(1) ‘final decision of the Administrator’ means—

“(A) a final determination of the Board of Veterans’ Appeals pursuant to section 4004 (a) or (b) of this title; or

“(B) a dismissal of an appeal by the Board of Veterans’ Appeals pursuant to section 4005 or 4008 of this title; and

“(2) ‘claim for benefits’ means—

“(A) an initial claim filed under section 3001 of this title;

“(B) a challenge to a decision of the Administrator reducing, suspending, or terminating benefits; or

“(C) any request by or on behalf of the claimant for reopening, reconsideration, or further consideration in a matter described in clause (A) or (B) of this paragraph.

"(b) Except as provided in subsection (f) of this section, after any final decision of the Administrator adverse to a claimant in a matter involving a claim for benefits under any law administered by the Veterans' Administration, such claimant may obtain a review of such decision in a civil action commenced within 180 days after notice of such decision is mailed to such claimant pursuant to section 4004(d) of this title. Such action shall be brought against the Administrator in the district court of the United States for the judicial district in which the plaintiff resides or the plaintiff's principal place of business is located, or in the district court of the United States for the judicial district where the principal offices of the Board of Veterans' Appeals (established under section 4001 of this title) are located.

"(c) The complaint initiating an action under subsection (a) of this section shall contain sufficient information to permit the Administrator to identify and locate the plaintiff's records in the custody or control of the Veterans' Administration.

"(d) Not later than 30 days after filing the answer to a complaint filed pursuant to subsection (a) of this section, the Administrator shall file a certified copy of the records upon which the decision complained of is based or, if the Administrator determines that the cost of filing copies of all such records is unduly expensive, the Administrator shall file a complete index of all documents, transcripts, or other materials comprising such records. After such index is filed and after considering requests from all parties, the court shall require the Administrator to file certified copies of such indexed items as the court considers relevant to its consideration of the case.

"(e) In an action brought pursuant to subsection (b) of this section, the court shall have the power, upon the pleadings and the records specified in subsection (d) of this section, to enter judgment in accordance with section 4026 of this title or remand the cause in accordance with such section or section 4027 of this title.

"(f)(1) No action may be brought under this section unless (A) the initial claim for benefits is filed pursuant to section 3001 of this title on or before the last day of the fifth fiscal year beginning after the effective date of this section, and (B) the complaint initiating such action is filed not more than 180 days after notice of the first final decision of the Administrator rendered after the last day of such fiscal year is mailed to the claimant pursuant to section 4004(d) of this title. If the case is reopened pursuant to section 4004(b)(2)(A) of this title within 180 days after such notice is mailed, the next final decision shall, for purposes of this subsection, be considered the first final decision of the Administrator.

"(2) No action may be brought under this section with respect to matters arising under chapters 19 and 37 of this title.

"§ 4026. Scope of review

"(a)(1) In any action brought under section 4025 of this title, the court, to the extent necessary to its decision and when presented, shall—

"(A) decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an action of the Administrator;

"(B) compel action of the Administrator unlawfully withheld;

"(C) hold unlawful and set aside decisions, findings (other than those described in clause (D) of this paragraph), and conclusions of the Administrator found to be—

"(i) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

"(ii) contrary to constitutional right, power, privilege, or immunity;

"(iii) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

"(iv) without observance of procedure required by law; and

"(D) in the case of a finding of material fact made in reaching a decision on a claim for benefits under laws administered by the Veterans' Administration, hold unlawful and set aside such finding when it is so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice would result if such finding were not set aside.

"(2) Before setting aside any finding of fact under paragraph (1)(D) of this subsection, the court shall specify the deficiencies in the record upon which the court would set aside such finding and shall remand the case one time to the Administrator for further action not inconsistent with the order of the court in remanding the case. In remanding a case under the first sentence of this paragraph, the court shall specify a reasonable period of time within which the Administrator shall complete the ordered action. If the Administrator does not complete action on the case within the specified period of time, the case shall be returned to the court for its further action.

"(b) In making the determinations under subsection (a) of this section, the whole record before the court pursuant to section 4025(d) of this title shall be subject to review, and the court shall review those parts of such record cited by a party, and due account shall be taken of the rule of prejudicial error.

"(c) In no event shall findings of fact made by the Administrator be subject to trial de novo by the court.

"(d) When a final decision of the Administrator is adverse to a party and the sole stated basis for such decision is the failure of such party to comply with any applicable regulation of the Veterans' Administration, the court shall review only questions raised as to compliance with and the validity of the regulation.

"§ 4027. Remands

"(a)(1) In any action brought under section 4025 of this title, the court shall, on motion of the Administrator made before the expiration of the time specified for the filing of an answer to a complaint filed pursuant to subsection (b) of such section, allow a single remand of a case to the Administrator for further review by the Administrator. If such review is not completed within 90 days after the date of such remand, the matter shall be returned to the court for its action.

"(2)(A) At any time after the Administrator files an answer, the court may, in the exercise of its discretion, remand the case to the Administrator for further action by the Administrator.

"(B) If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there is good cause for granting such leave, the court shall remand the case to the Administrator and order such additional evidence to be taken by the Administrator.

"(C) In the case of a remand under subparagraph (A) or (B) of this paragraph, the court may specify a reasonable period of time within which the Administrator shall complete the required action.

"(b) After a case is remanded to the Administrator under subsection (a) of this section, and after further action by the Administrator, including consideration of any additional evidence, the Administrator shall modify, supplement, affirm, or reverse the findings of fact or decision, or both, and shall file with the court any such modification, supplementation, affirmation, or reversal of the findings of fact or decision or both, as the case may be, and certified copies of any additional records and evidence upon which such modification, supplementation, affirmation, or reversal was based. Any such modification, supplementation, affirmation, or reversal of the findings of fact or decision shall be reviewable by the court only to the extent provided in section 4026 of this title.

"§ 4028. Survival of actions

"Any action brought under section 4025 of this title shall survive notwithstanding any change in the person occupying the office of Administrator or any vacancy in such office.

"§ 4029. Appellate review

"The decisions of a district court pursuant to this chapter shall be subject to appellate review by the courts of appeals and the Supreme Court of the United States in the same manner as judgments in other civil actions.".

(b) The table of sections at the beginning of such chapter is amended—

(1) by inserting before the item relating to section 4001 the following new item:

"SUBCHAPTER I—GENERAL";

and

(2) by adding after the item (added by section 108(b) of this Act) relating to section 4011 the following new items:

"SUBCHAPTER II—JUDICIAL REVIEW

"4025. Right of review; commencement of action.
"4026. Scope of review.
"4027. Remands.
"4028. Survival of actions.
"4029. Appellate review.".

SEC. 303. Section 1346(d) of title 28, United States Code, is amended by inserting before the period at the end thereof a comma and "except as provided in subchapter II of chapter 71 of title 38".

TITLE IV—ATTORNEYS' FEES

SEC. 401. Section 3404 is amended by striking out subsection (c) and inserting in lieu thereof the following:

"(c) The Administrator shall approve reasonable attorneys' fees to be paid by the claimant to attorneys for representation before the Veterans' Administration in connection with a claim for benefits under laws administered by the Veterans' Administration, but in no event shall such attorneys' fees exceed—

"(1) for any claim resolved prior to or at the time that a final decision of the Administrator is first rendered, $10; or

"(2) for any claim resolved after such time—

"(A) if the claimant and an attorney have entered into an agreement under which no fee is payable to such attorney unless the claim is resolved in a manner favorable to the claimant, 25 percent of the total amount of any past-due benefits awarded on the basis of the claim; or

"(B) if the claimant and an attorney have not entered into such an agreement, the lesser of—

"(i) the fee agreed upon by the claimant and the attorney; or "(ii) $500, or such greater amount as may be specified from time to time in regulations which the Administrator shall prescribe based on changed national economic conditions subsequent to the date of enactment of this subsection, except that the Administrator may, in the Administrator's discretion, determine and approve a fee in excess of $500, or such greater amount if so specified, in an individual case involving extraordinary circumstances warranting a higher fee.

"(d)(1) If, in an action brought under section 4025 of this title, the matter is resolved in a manner favorable to a claimant who was represented by an attorney, the court shall determine and allow a reasonable fee for such representation to be paid to the attorney by the claimant. When the claimant and an attorney have entered into an agreement under which the amount of the fee payable to such attorney is to be paid from any past-due benefits awarded on the basis of the claim and the amount of the fee is contingent on whether or not the matter is resolved in a manner favorable to the claimant, the fee so determined and allowed shall not exceed 25 percent of the total amount of any past-due benefits awarded on the basis of the claim.

"(2) If, in an action brought under section 4025 of this title, the matter is not resolved in a manner favorable to the claimant, the court, taking into consideration the likelihood at the time such action was filed that the claimant would prevail, may determine and allow a reasonable fee not in excess of $750 to be paid to the attorney by the claimant for the representation of such claimant.

"(e) To the extent that past-due benefits are awarded in proceedings before the Administrator or a court, the Administrator shall direct that payment of any attorneys' fee that has been determined and allowed under this section be made out of such past-due benefits, but in no event shall the Administrator withhold for the purpose of such payment any portion of benefits payable for a period subsequent to the date of the final decision of the Administrator or court making such award.

"(f) The provisions of this section shall apply only to cases involving claims for benefits under the laws administered by the Veterans' Administration, and such provisions shall not apply in cases in which the Veterans' Administration is the plaintiff or in which other attorneys' fee statutes are applicable.

"(g) For the purposes of this section—

"(1) the terms 'final decision of the Administrator' and 'claim for benefits' shall have the same meaning provided for such terms, respectively, in section 4025 (a) of this title; and

"(2) claims shall be considered as resolved in a manner favorable to the claimant when all or any part of the relief sought is granted.

"(h) In an action brought under section 4025 of this title, the court may award to a prevailing party, other than the Administrator, reasonable attorneys' fees and costs in accordance with the provisions of subsection (d) of section 2412 of title 28, as in effect on the day before the effective date of the repeal of such subsection (as provided in section 204(c) of the Equal Access to Justice Act (Public Law 96-481; 94 Stat. 2329; 28 U.S.C. 2412 note)).".

Sec. 402. Section 3405 is amended—

(1) by striking out "or" after "title,"; and

(2) by striking out "him" and inserting in lieu thereof "such claimant or beneficiary, or (3) with intent to defraud, in any manner willfully and knowingly deceives, misleads, or threatens a claimant or beneficiary or prospective claimant or beneficiary under this title with reference to any matter covered by this title".

TITLE V—EFFECTIVE DATES

Sec. 501. This Act and the amendments made by this Act shall take effect on the first day of the first month beginning not less than 180 days after the date of enactment of this Act.

SEC. 502. A civil action authorized in subchapter II of chapter 71 of title 38, United States Code (as added by section 302(a) of this Act) may be instituted to review decisions of the Board of Veterans' Appeals rendered on or after April 1, 1987.

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II

100TH CONGRESS
2D SESSION

S. 2292

To amend title 38, United States Code, to provide for judicial review of rulemaking by the Veterans' Administration, to allow attorneys' fees in cases involving veterans' claims for benefits, and to make other improvements in the provision of veterans' benefits.

IN THE SENATE OF THE UNITED STATES

APRIL 18 (legislative day, APRIL 11), 1988

Mr. MURKOWSKI introduced the following bill; which was read twice and referred to the Committee on Veterans' Affairs

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A BILL

To amend title 38, United States Code, to provide for judicial review of rulemaking by the Veterans' Administration, to allow attorneys' fees in cases involving veterans' claims for benefits, and to make other improvements in the provision of veterans' benefits.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Veterans' Judicial Review Act".

SEC. 2. REFERENCES TO TITLE 38, UNITED STATES CODE.

Except as otherwise expressly provided, whenever in this Act an amendment or a repeal is expressed in terms of an amendment to, or a repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision to title 38, United States Code.

SEC. 3. JUDICIAL REVIEW OF AGENCY RULEMAKING.

(a) APA PROCEDURES.—(1) Chapter 3 of title 38, United States Code, is amended by inserting after section 222 the following new section:

"§ 223. Rulemaking: procedures and judicial review

"(a) The provisions of section 553 of title 5 (other than subsection (a)(2) thereof) shall apply, according to the provisions of that section, to any matter relating to loans, grants, or benefits under the jurisdiction of the Administrator.

"(b) Any action of the Administrator subject to subsection (a) (other than the adoption or readjustment of the schedule of ratings for disabilities under section 355 of this title) may be reviewed in accordance with chapter 7 of title 5. Such review shall be brought in the United States Courts of Appeals.".

(2) The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 222 the following new item:

"223. Rulemaking: procedures and judicial review.".

(b) Conforming Amendment.—Section 211(a) of such title is amended by striking out "except as provided in sections 775, 784" and inserting in lieu thereof "except as provided in sections 223, 775, 784, 4010,".

SEC. 4. ATTORNEYS' FEES.

(a) Section 3404 is amended by striking out subsection (c) and inserting in lieu thereof the following:

"(c) The Board of Veterans' Appeals shall approve reasonable attorneys' fees to be paid by the claimant to attorneys for representation before the Veterans' Administration (including representation before the Board of Veterans' Appeals) in connection with a claim for benefits under laws administered by the Veterans' Administration, but in no event shall such attorneys' fees exceed—

"(1) for any services rendered prior to the issuance of a statement of the case under section 4005(d) of this title, or for any services not otherwise provided for, $10; or

"(2) for services in connection with a challenge to the validity of regulations of the Veterans' Administration provided in section 4010, rendered on or after the issuance of a statement of the case under section 4005(d) of this title—

"(A) if the claimant and an attorney have entered into an agreement under which no fee is payable to such attorney unless the challenge is resolved in a manner favorable to the claimant, 25 percent of the total amount of any past-due benefits awarded on the basis of the claim; or

"(B) if the claimant and an attorney have not entered into such an agreement, the lesser of—

"(i) the fee agreed upon by the claimant and the attorney; or

"(ii) $500, or such greater amount as may be specified from time to time in regulations which the Board shall prescribe based on changed national economic conditions subsequent to the date of enactment of this subsection, except that the Board may, in its discretion, determine and approve a fee in excess of $500, or such greater amount if so specified, in an individual case involving extraordinary circumstances warranting a higher fee.

"(d) Actions before the Court of Appeals—

"(1) If, in an action brought in a United States Court of Appeals under section 223 or 4010 of this title, the matter is resolved in a manner favorable to a claimant who was represented by an attorney, the court shall determine and allow a reasonable fee for such representation to be paid to the attorney by the claimant.

"(2) If, in an action brought in a United States Court of Appeals under section 223 or 4010 of this title, the matter is not resolved in a manner favorable to a claimant who was represented by an attorney, the court, taking into consideration the likelihood at the time such action was filed that the claimant would prevail, may determine and allow a reasonable fee not in excess of $750 to be paid to the attorney by the claimant for the representation of such claimant.

"(3) For the purposes of this subsection, a matter shall be considered resolved in a manner favorable to the claimant when all or any part of the relief sought is granted.

"(4) In an action brought in a United States Court of Appeals under section 223 or 4010 of this title, the court may award to a prevailing party, other than the Administrator, reasonable attorneys' fees and costs in accordance with the provisions of subsection (d) of section 2412 of title 28.

"(e) To the extent that past-due benefits are awarded in proceedings before the Veterans' Administration (including proceedings before the Board of Veterans' Appeals), the Administrator shall direct that payment of any attorneys' fee that has been determined and allowed under this section (including allowances made by a Court of Appeals pursuant to subsection (d)(1) or (d)(2) of this section) be made out of such past-due benefits, but in no event shall the Administrator withhold for the purpose of such payment any portion of benefits payable for a period subsequent to the date of the final decision in such case.

"(f) The provisions of this section shall apply only to cases involving claims for benefits under the laws administered by the Veterans' Administration, including petitions for review by the Administrator pursuant to section 4010, and such provisions shall not apply in cases in which the Veterans' Administration is the plaintiff or in which other attorneys' fee statutes are applicable.".

(b) EFFECTIVE DATE.—The amendments made by subsection (a) shall aoply with respect to cases-in which a statement of the case is issued after the date of enactment of this Act.

SEC. 5. BOARD OF VETERANS' APPEALS.

(a) REVIEW OF REGULATIONS OF THE VETERANS' ADMINISTRATION.—(1) Section 4004 of title 38, United States Code, is amended:

(A) by striking out subsection (c); and

(B) by redesignating subsection (d) as subsection (c).

(2) Chapter 71 of such title is amended by adding at the end the following new sections:

"§ 4010. Review of regulations

"(a) Right of Review.—Where an appellant before the Board has challenged the validity of regulations of the Veterans' Administration involved in his or her case (other than the validity of the schedule of ratings for disabilities under section 355 of this title), he or she shall be afforded the right to have such challenges adjudicated and resolved by the Board, subject to review by the United States Court of Appeals.

"(b) Procedure.—(1) When challenges to the validity of regulations of the Veterans' Administration involved in an appeal (other than challenges to the validity of the schedule of ratings for disabilities under section 355 of this title) have been raised, the Board shall adjudicate and resolve such challenges separately from the adjudication and resolution of all other issues in the appellant's case.

"(2) Upon the final resolution of the case of which the challenge referred to in subsection (b)(1) is a part, the Board's determination of the validity of the regulations challenged shall be subject to review in the United States Court of Appeals. The subject matter of such action shall be limited to the validity of the regulations of the Veterans' Administration involved in the appeal, to include the Board's determination, separate from its adjudication of all other issues in the appellant's case, of the validity of those regulations.

"(3) The appellant shall have 60 days from the date of the final resolution referred to in subsection (b)(2) within which to initiate a petition for review before the United States Court of Appeals—

"(A) If such action is not initiated within such period, the Board's determination shall be final and conclusive and no other official or any court of the United States shall have power to review any such decision by an action in the nature of mandamus or otherwise, except as provided in subsection (b)(4).

"(B) Where the reviewing court has reviewed and resolved the questions raised, the case shall be remanded to the Board for further proceedings.

"(C) Notwithstanding any other provision of law, the Board's determination of all other issues on appeal shall be final and conclusive and no other official or any court of the United States shall have power to review any such determination by an action in the nature of mandamus or otherwise.

"(4) In any case in which the Board rules that a regulation of the Veterans' Administration is invalid, the Administrator may, upon the final resolution of such case, petition for review of such ruling to the United States Court of Appeals for the Federal Circuit. Such petition shall be filed within 60 days from the date of the final resolution referred to in subsection (b)(2). The appellant before the Board shall be notified of such filing and shall be entitled to appear in such action.

"(5) In the case of an appellant, a request for review pursuant to this section shall be brought in the United States Court of Appeals where the appellant resides, or in the United States Court of Appeals for the Federal Circuit.

"(6) To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning of the terms of the regulations challenged. The reviewing court shall hold unlawful and set aside regulations found to be—

"(A) contrary to constitutional right, power, privilege, or immunity; or

"(B) in excess of statutory jurisdiction, authority, or limitations, short of statutory right; or

"(C) resting upon a policy judgment, reasoning or factual premise so unacceptable as to render the regulation arbitrary.

In no event shall the facts of the appeal or the application of any law or regulation to those facts be subject to review by the reviewing court unless they raise a constitutional issue, nor shall the validity of the schedule of ratings for disabilities under section 355 of this title be subject to review under this section.

"(7) The right of review granted under this section is in addition to the right of review under section 223 of this title.

"(8) For the purposes of review under this section, the term 'regulation' includes those statements of general policy and interpretations of general applicability which have been adopted by the Administrator.".

(b) Review of Attorneys' Fees.—Chapter 71 of such title is amended by adding at the end of the following new section:

"§ 4011. Review of attorneys' fees

"The Board may review the reasonableness of any fee arrangement for payment of attorneys' fees by a claimant during proceedings within the Veterans' Administration or before the Board. If the Board finds that any amount to be payable from past due benefits is excessive or unreasonable, the Board may reduce such amount. A decision of the Board under this section is final and may not be reviewed by any court.".

(c) Changes to the Board.—(1) Section 4001 of such title is amended:

(A) in the first sentence of subsection (a), by striking the words "directly responsible to the Administrator";

(B) by amending subsection (b) to read as follows:

"(b) The Chairman and Vice Chairman of the Board shall be appointed by the President with the advice and consent of the Senate for a term of 15 years. Members of the Board shall be appointed by the Chairman with the approval of the President for a term of 15 years.";

(C) in the first sentence of paragraph (3) of subsection (c) of such section, by striking out "In each annual report to the Congress under section 214 of this title, the Administrator shall provide" and inserting in lieu thereof "The Chairman of the Board shall submit an annual report to the Congress providing";

(D) in the second sentence of paragraph (3) of subsection (c) of such section, by striking out "the Administrator" and inserting in lieu thereof "the Chairman"; and

(E) by adding the following new subsections at the end of such section:

"(d) Notwithstanding any other provision of law, no member of the Board, and no temporary member while so serving, shall be eligible for or receive, directly or indirectly, bonuses in addition to salary.

"(e) The Administrator shall allocate sufficient resources (including sufficient personnel with the necessary skills and qualifications) to enable the Board to carry out its responsibilities under this chapter.".

(3) The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 4009 the following new items:

"4010. Review of regulations.
"4011. Review of attorneys' fees.".

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OPENING STATEMENT
SENATOR ALAN CRANSTON, CHAIRMAN
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES SENATE LEGISLATIVE HEARING
ON S. 11 --
"VETERANS' ADMINISTRATION ADJUDICATION PROCEDURE
AND JUDICIAL REVIEW ACT"
AND S. 2292 --
"VETERANS' JUDICIAL REVIEW ACT"

April 28, 1988

Good morning and welcome to each of you. Today's hearing concerns the subject of judicial review. At the outset, I would like to thank all of the witnesses for their patience, cooperation, and understanding regarding the postponement of this hearing. I appreciate your flexibility in adapting your schedules to the new hearing date, which, as you know, was changed in order to take testimony on S. 2292, legislation introduced by the Committee's Ranking Minority member, Senator Frank Murkowski, on April 18.

Today, we will be hearing testimony on S. 11 -- a bill to codify some of the existing beneficial VA adjudication procedures, allow review of rules and regulations, and provide an opportunity for a veteran to seek judicial review of a final decision of the Board of Veterans' Appeals (BVA) in a federal court -- and on S. 2292, which sets up procedures for review of regulations by the BVA and the U.S. Courts of Appeals, provides for review of rulemaking, and seeks to give the BVA more independence. Although there are significant differences, both in the philosophy reflected and the actual provisions, there are a number of similarities between the two bills.

Clearly, the introduction of S. 2292 changes the equation somewhat -- it provides us with new alternatives to consider, new support for some form of judical review, and yet another opportunity to re-examine and re-evaluate S. 11. It is the Committee's goal, and I am confident that Senator Murkowski will agree with me, to report out the best judicial review bill possible, in light of all the factors involved.

I would like to address some speculation that judicial review is only being pursued as a response to difficulties encountered in particular types of complex cases, such as P.T.S.D., radiation, or Agent Orange cases. Although I freely acknowledge that these types of cases may benefit most from the availability of judicial review, which is a desirable side benefit, I want to be clear that the motivating force behind the continued push for judicial review is the belief that it is a fundamental right that should be afforded to all veterans. As I said in 1979, in presiding over hearings on the first judicial review bill:

> My goals in this area are very simple.. I want all veterans to be served with compassion, fairness, and efficiency, and I want each individual veteran to receive from the Government every benefit and service to which he or she may be entitled under law.

Those goals continue to be my motivation for moving forward with a bill for judicial review.

In the past, I have said that the need for judicial review does not depend on whether or not the present system of claims adjudication is broken. I continue to believe that is true. In the past year or two, however, it has become increasingly clear that the entire claims adjudication process, including the BVA, has some serious problems. There are problems with staffing, quality assurance, the use of a bonuses and production quotas which seem to reward quantity rather than quality, and a number of other practices which appear to have an adverse effect on quality of review throughout the process. Although the G.A.O. is currently conducting an in-depth study of the claims adjudication process at the regional office level, and the Committee has begun a comprehensive review of the BVA, which will include focus in an oversight hearing in the near future, there can be little doubt that the system needs fixing.

The chairman of the BVA commented during a recent House hearing that even the specter of judicial review has made some of the people reviewing BVA claims more careful to see that the Board does everything it can. Certainly, the reality of judicial review would have a similar, though more pronounced, effect.

Although judicial review has been surrounded by its share of controversy, I note that S. 11, as did it's nearly identical predecessor, S. 367, which was reported favorably by this Committee while Senator Murkowski was chairman, has the strong bipartisan support of 29 cosponsors including my good friends and colleagues on the Committee, our former chairman, Senator Simpson, and Senators Matsunaga, DeConcini, Mitchell, Rockefeller, and Stafford.

The purpose behind S. 11 is to ensure that veterans and other claimants before the VA receive all benefits to which they are entitled under the law, by providing an opportunity for judicial review of final VA decisions denying claims for benefits, by codifying certain internal procedures of the VA relating to the adjudication of benefit claims, by requiring that VA rulemaking procedures comply with provisions of the Administrative Procedure Act relating to notice and comment, and by allowing claimants to pay attorneys reasonable fees for representation before the BVA but only after an initial BVA decision and for representation in court.

BACKGROUND

In the last four Congresses, the Senate has gone on record as supporting legislation to eliminate provisions in current law that accord veterans second-class citizenship in the very fundamental area of their relationship with the federal government with respect to statutory benefits and services. The first time was on September 17, 1979, while I was Chairman of the Committee during the 96th Congress, when the Senate passed a predecessor measure, S.330; the second was during the 97th Congress, while Senator Simpson was chairman, when S. 349 was passed on September 14, 1982; the third was on June 15, 1983, during the 98th Congress, again while Senator Simpson was chairman, when S. 636 was passed. On each of these occasions, the measure died in the House, without any action having been taken.

During the last Congress, while, as I mentioned earlier, Senator Frank Murkowski was the chairman of the Committee, S. 367 was passed on July 30, 1985, and was sent to the House, where a companion bill, H.R. 585 introduced by my good friend from California, Don Edwards, was under consideration in the House Veterans' Affairs Committee; although a number of hearings were held and a markup conducted, H.R. 585, despite its 233 cosponsors, never made it out of committee, dying on a 20-12 tabling motion.

S. 11, as it comes before us today, has been through an extended period of development which began in the 94th Congress. During this period the Committee on Veterans' Affairs has held nine hearings on judicial review legislation, and the Senate Judiciary Committee has held one such hearing. It is clear that the Senate has given a great deal of consideration to the issue of providing for judicial review of VA decisions and has indicated very clearly its support for providing an opportunity for a veteran aggrieved by a VA decision on a claim for benefits to obtain a review in court of such a decision, including factual issues under carefully limited circumstances.

I remain convinced that S. 11 represents the appropriate approach to this issue, but I realize that this view is not without controversy and that Senator Murkowski's bill represents an alternative approach. I look forward to hearing the testimony today and working with Frank Murkowski and our colleagues in the Senate and our colleagues on the House Veterans' Affairs Committee to develop a consensual approach on this important issue.

NEED FOR A JUDICIAL REVIEW BILL

There are a number of strong reasons supporting the enactment of judicial review legislation, and I would like to highlight some of them briefly at this time.

Fairness for Each and Every Claimant: One of the principal reasons judicial review is needed is to help ensure fairness to individual claimants before the VA In saying this, I do not mean to indicate a belief that the BVA intentionally denies veterans full and fair hearings. To the contrary, I believe that the members of the Board are fair-minded, conscientious individuals who generally make a concerted effort to carry out their responsibilities in an evenhanded fashion and that, by and large, most claimants before the VA are treated fairly.

However, I do know that, as I mentioned earlier, there are problems with the present system. The final, unappealable decisions by the Board, together with the statutory limit of $10 on the amount a claimant before the VA can pay an attorney for representation before the VA, leaves many disappointed claimants believing that they have been denied a full and fair opportunity to pursue their claims and that they are denied important rights that they and other citizens have in dealing with virtually all other federal agencies.

In addition to this perception of justice denied is the reality of actual injustices under the current system, a problem that the opportunity for judicial review would substantially ameliorate. Although I know that the VA claims adjudication system is set up to be supportive of the veterans -- as it should be -- the VA is a very large and complex federal agency, and unfair results do occur. I have long been concerned that the tremendous volume of claims handled be the Department of Veterans' Benefits and the BVA provides a significant opportunity for some individual injustices to occur. On the basis of current trends, the number of these VA claims will continue to increase, thereby increasing the possibility of unintended unfair but potentially avoidable results.

Review of Questionable Agency Policies: Another basic reason for judicial review legislation is the need to establish a basis for the review of questionable agency actions restricting, withholding, or withdrawing VA benefits -- actions that increase in frequency as there is greater pressure within the Executive Branch for the VA to achieve cost savings in current programs. There have been numerous examples of such actions in recent years -- such as efforts by the VA to collect for the cost of health care provided to veterans who happen to be VA employees; attempts by the agency, at the direction of the Office of Management and Budget, to restrict beneficiary travel reimbursement for eligible veterans; the VA's drawing overly restrictive regulations to implement the targeted GI bill delimiting date extension enacted in Public Law 97-72 as well as to implement the radiation exposure health care eligibility enacted in that same Public Law; allegations that some VA stations are applying very stringent standards in cases in which Vietnam veterans are seeking to be granted service connection for Post-Traumatic Stress Disorder; the review during 1985-86 of compensation awards to veterans in Puerto Rico; the restriction imposed under Gramm-Rudman-Hollings on low interest VA-administered insurance policy loans; and what many believe is an overly aggressive debt-collection effort.

In addition to these examples of agency action restricting benefits, there is also the potential for unduly restrictive legal opinions from the Office of the General Counsel which may operate to deny veterans' access to benefits to which they would otherwise by entitled. One example with which I was involved concerned a woman veteran who had a service-connected disability which prevented her from becoming pregnant. In the course of assisting her, I learned of a General Counsel's opinion holding that the VA does not have legal authority under current law to provide services to help overcome such a disability. Although I did not believe that the VA's restrictive interpretation of its existing authority was correct -- and did my utmost to bring about a change in that interpretation and then to amend the law -- I have not been successful.

In each of these instances and in other similar cases, the lack of access to court review has serious implications. Although, the Committees on Veterans' Affairs in both houses carry out significant oversight of the activities of the VA, the limited resources of the Committees do not allow for thorough review of and Congressional action to resolve satisfactorily all of the legal and policy issues arising in such a large and complex agency.

In addition, I do not believe that aggrieved veterans should have to be dependent for relief on Congressional Committee processes which, for all their virtues, cannot be fairly said to be designed to achieve or to be capable of achieving a systematic and evenhanded dispensation of justice.

Also, although the results of committee oversight are often salutary in terms of bringing about -- either through legislation of administrative action under pressure -- reversals of agency action, there is usually a long delay in having the correction made.

If the veterans directly affected by various VA actions have access to court to challenge those actions, they would be guaranteed the opportunity to be heard by an entity outside of the VA and, in certain cases, to obtain urgent and timely relief. As mentioned earlier, the VA's handling of claims based on exposure to Agent Orange, claims based on exposure to radiation from the detonation of a nuclear weapon, and claims of post traumatic stress disorder would benefit from outside review by allowing those who believe they have been harmed to have their claims tested in an independent forum.

In making these points, I do not want to be understood to be suggesting that the VA is wrong on all of these issues. Rather, I am suggesting that outside review by the independent branch of government established in our constitutional framework with the special responsibility of determining whether governmental action is legal and whether it is fundamentally fair would benefit all parties involved. The VA would have its processes subjected to appropriate scrutiny and, to the extent the agency's actions were upheld, would be vindicated. Likewise, to the extent the agency's actions were held unlawful or fundamentally unfair, steps could be taken to improve the process so as to ensure that the agency is fulfilling its mission to serve veterans in the best possible fashion. I am concerned that agency action that does not have the benefit of outside scrutiny may fail to address fully the legitimate needs of those the agency exists to serve, and I believe that providing for judicial review would basically correct this shortcoming.

Review by an Independent Tribunal: Another important reason in support of judicial review is related to the status of the Board of Veterans' Appeals. Fundamental principles of due process, as guaranteed by the Constitution, require an independent review of administrative action affecting individuals' liberty or property interests. Although there are earlier court decisions suggesting that veterans' benefits are gratuities and not worthy of general due process protections, such a viewpoint is no longer valid, if it ever was, either philosophically -- veterans' benefits are earned by military service -- or legally. A number of decisions rendered by the Supreme Court in the last two decades -- for example, Goldberg v. Kelly, 397 U.S. 254 (1970); Board of Regents v. Roth, 408 U.S. 564 (1972); Goss v. Lopez, 419 U.S. 565 (1975); and Paul v. Davis, 424 U.S. 693 (1976) -- have held that various statutory governmental benefits are legal entitlements and, thus, protected property interests of the beneficiary.

I do not believe that review by the Board provides the required independent action required by due process. Although the Board is not directly under the control of the Administrator of Veterans' Affairs, it is far too bound up with the agency, in many informal ways, to be truly independent. More importantly, its independence is restricted by law. Under section 4004(c) of title 38, the Board is "bound in its decisions by the regulations of the Veterans' Administration, instructions of the Administrator, and the precedent opinions of the chief law officer." I certainly do not mean to suggest any lack of integrity on the part of either the Administrator or VA General Counsel, but the fact is that the potential for them -- and future incumbents in those offices -- to restrict the decision-making authority of the Board significantly restricts that body's independence.

Clarify the State of the Law: A final purpose of judicial review legislation is to help clarify the state of the law on the scope of the current law provision that bars judicial review, section 211(a) of title 38. Although it was believed that the U.S. Supreme Court would settle some important differences between the various U.S. Courts of Appeals regarding the sweep of this prohibition, particularly with regard to review of regulations, when the Court decided the connected cases of *Traynor v. Turnage* and *McKelvey v. Turnage*, __ U.S. __ (April 20, 1988), the Court left the broader issue unresolved, holding, on this threshold issue, that where the issue is whether the VA regulation sought to be administered is valid in light of a subsequent statute whose enforcement is not the exclusive domain of the Veterans' Administration, judicial review is available.

Despite the agency's acknowledgement, in testimony before our Committee in 1983, that some courts of appeals clearly have allowed veterans to bring actions challenging VA regulations on other than constitutional grounds and that the VA supports that position, the Department of Justice, on behalf of the VA, continues to raise the section 211(a) statutory bar to judicial review in VA cases that do not involve individual claims for benefits.

Scope of Review: The last matter that I want to touch on involves the appropriate scope of factual review that a court should apply in the review of a VA decision. This issue has been a matter of long and involved discussion in our Committee over the years, and I will not attempt to go over all that background. Rather, the one point I want to stress on this issue today, especially in light of the provisions of S. 2292, which are discussed below, is my belief that it is vital that whatever scope of review is chosen must provide some basis for court review of questions of fact. The bills passed by the Senate in 1982, 1983, and 1985 each included a very narrow scope of review of factual issues. S. 11 contains that same provision.

Specifically, S. 11 would permit review only where the court found that a finding by the VA on a *material* fact "is so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice would result if such finding were not set aside," and then would only permit the court to remand the case to the BVA for further action. Our intent in providing only a very narrow basis on which a court could review a BVA decision on a question of fact is to reaffirm the Board's role as the expert final arbiter of such questions. However, by refusing to limit the review to questions of law only and thus preclude all review of questions of fact -- now advocated by Senator Murkowski in S. 2292 -- S. 11 would afford an opportunity to correct truly egregious decisions on fact questions. Although I believe that such decisions are relatively rare, I do not believe that total preclusion of review of facts would be appropriate or productive. Indeed -- and I believe this is a vitally important point -- the very existence of the possibility of review even with such a very narrow window of reviewability would, I am confident, have the effect of preventing almost all such outrageous decisions from ever being made in the first instance.

Fundamental Fairness for Veterans: I want to answer a question I am sometimes asked in view of our lack of success to date in getting judicial review legislation favorably considered in the other body. The question is usually posed along the following lines: "What is so wrong about the present system for adjudicating VA claims that you persist in pursuing this legislation?" Although I am fully able to respond to the issue posed in this way -- as I did briefly earlier in this statement -- I do not believe finding fault with the current system is a necessary step in making the case for judicial review.

Rather, I believe the appropriate first question is whether there is any continuing reason -- putting to one side the question of whether there ever was a valid reason -- for denying veterans the same right of access to court review of VA benefits decisions that is available in the case of virtually every other major Federal benefit program. Although there are some restrictions in current law on access to judicial review of some Federal agency actions, only one area in which a restriction exists, Federal employee workers' compensation benefits, is at all analogous to VA benefits and is an infinitely smaller benefit program than the combination of the myriad VA benefits programs codified with title 38 of the U.S. Code. Moreover, those benefits programs which VA benefits programs resemble most closely, denials of benefits under the Social Security Act -- such as old age and survivors insurance, Social Security Disability Insurance, Supplemental Security Income, and Medicare -- are all able to be challenged in court.

When the issue is posed this way -- why should veterans be denied rights available to others in their dealings with the Federal Government in directly analagous areas? -- I have never heard a satisfactory answer justifying maintaining the current preclusion. I realize that concerns have been expressed that judicial review could have an undue impact on the agency's current claims adjudication processes. I have also heard concerns that providing for judicial review would make the VA claims process more adversarial, would create unnecessary delay, and would cost veterans money in the form of attorneys' fees. Although I fully recognize the genuineness of these concerns, I do not believe they are well founded. Briefly, here is why.

RESPONSES TO ARGUMENTS AGAINST JUDICIAL REVIEW

As to the possibility that providing for judicial review could have an untoward effect on the current VA system, the legislation that has been developed in the Senate over the years contains numerous provisions that have been designed expressly to avoid that result. These provisions would ensure that the VA's current, desirable adjudication practices and procedures would be protected by providing a statutory basis for them. In this way, not only would current processes be protected in the event of judicial review, but they would actually be strengthened by being set out in law rather than being based on regulations or, in some cases, on no more than informal past practice.

With reference to the concerns about judicial review causing undue delay or about it somehow making the veteran and the agency adversaries, it is important to remember that under S. 11 -- although not under S. 2292 -- judicial review would be available only after a veteran's claim has been turned down by the regional office, and, on appeal, by the Board of Veterans' Appeals. At that point, it is difficult to see how providing for judicial review could create any delay. The VA proceedings would have run their normal course. A process no longer going anywhere can't be delayed. Moreover, once the claim is finally denied, the veteran and the VA are clearly in dispute. A veteran whose claim has been finally denied by the VA's highest appeal tribunal would not become an adversary of the VA by virtue of having court review available. Courts don't create adversarial situations; they resolve them.

Regarding attorneys' fees, to me it's almost incomprehensible that the current law limit of $10 on the amount that an attorney can be paid has survived to this time. Whatever behavior characterized the legal profession at the time the original limitation was enacted following the Civil War, it is no longer credible to insist that attorneys would prey on innocent veterans. I also am unable to accept the view that veterans, as a class, are so unable to protect themselves that there needs to be a barrier erected in law between them and attorneys. Let me be clear -- I do not believe that most veterans with claims before the VA would be well advised to seek the assistance of an attorney. Certainly, were I asked, my first advice to a veteran with such a claim would be to contact a veterans' service officer. That is what I tell veterans today and what I would tell them were judicial review available. But the existence of the valuable, free resource of representation before the VA by veterans' service officers in claims adjudication is not a reason for precluding a veteran from seeking to obtain the services of an attorney at the end of the internal VA process if the veteran wishes to do so.

This antiquated fee has effectively limited the degree of representation of veterans and other claimants by attorneys in the VA adjudication system. This lack of attorney representation for claimants is ironic in light of the large force of attorneys working for the VA in the claims area, and the number of times the VA, through its attorneys, has sued veterans. In F.Y. 1985, the number of lawsuits filed against veterans by the VA (51,209) surpassed the number of claims that the BVA reviewed (45,273).

I stress again that S. 11 would not lift the $10 attorney-fee limit in a particular case until after the veteran has received an initial BVA decision. In contrast, S. 2292 would allow an attorney to get involved after the notice of disagreement is filed, and before the case is presented to the BVA, albeit with involvement limited to the "legal issues". Thus, S. 11 contemplates that the current practice of veterans being assisted by skilled veterans' service officers throughout the VA and BVA administrative processes would continue to operate exactly as it does now, whereas S. 2292 would have attorneys involved at an earlier stage.

It is important, however, as S. 11 would provide, that a veteran, once he or she has received an initial BVA decision and has sought an attorney's assistance to appeal that decision, would be able to seek further BVA review before going to court. I realize that some have advocated limiting an attorney's involvement exclusively to a court's review of a case. Because this measure allows for court review only of the record made by the agency-- and, in fact, expressly precludes de novo review of the claim -- limiting an attorney's involvement to court proceedings would, in many instances, preclude a veteran from receiving any assistance from an attorney because the attorney would be unable to improve the agency record. Alternatively, the attorney could seek a remand from the court, a procedure that would result in an unnecessary use of court time and which would lead to further, unnecessary delay in the final resolution of the veteran's claim. Permitting an attorney representing a veteran to seek to reopen the BVA decision would avoid these problems. It would also have the further benefit of promoting the possibility of a claim being resolved finally before the BVA without resort to court action -- a result which in many cases would be more advantageous for the veteran in terms of speedy justice and the cost of the attorney's time.

I want to address one final argument that is sometimes raised as a reason for continuing the bar to judicial review -- the possible impact of a new class of claimants on the Federal Judiciary. Without detailing the various contentions on this point -- and there have been widely differing views on this issue expressed before our Committee over the years -- I do not understand why veterans and others with claims before the VA should continue to be discriminated against and denied important rights because treating them fairly might enlarge the responsibilities of the court system. If the Federal court system is overburdened, the Congress should address that problem on an equitable basis by expanding available resources. It is blatantly unfair and arbitrary to deal with perceived problems in the courts by singling out veterans for exclusion with respect to benefits earned by service in the military.

In any event, in my view, after a shakedown period in which the narrow scope-of-fact review had resulted in summary judgments against plaintiffs with poor cases and after the BVA had become accustomed to being subject to outside review and had adjusted its decision making and decision writing activities accordingly, I do not believe the amount of litigation would be a substantial burden on the Federal Judiciary.

I do think that perhaps it would be preferable for this review to bypass the District Courts since no trial is contemplated by the provisions of S. 11, and in my invitation letters for this hearing I asked the witnesses to address this issue.

As we discuss the issue of judicial review of individual cases on the VA, including the BVA, the Federal Judiciary, veterans and their families, let us all be aware that a certain amount of the discussion of the impact of such review amounts to pure speculation. Judicial review, whether of individual claims as provided for in S. 11 or of regulations as provided in S. 2292, has not been tested or even tried at the VA. We are all, in effect, trading speculation on its effects.

With that in mind, I note the sunset clause in proposed new section 4025(f) as would be added by section 302 of S. 11. As a result of the provision, judicial review would not be available to claimants unless the initial claim for benefits is filed on or before the last day of the fifth fiscal year beginning after the effective date of the bill, and within the requisite 180 period after a final decision by BVA. This provision would allow an opportunity to discover the actual effects of judicial review, and to make judgments based on the outcome before considering whether to make it a permanent authority.

COST ESTIMATE

When S. 367 was before the Senate in the last Congress, the Congressional Budget Office estimated that its first-year costs would be $2 million and the cost for the first 5 years would be $16 million. Although that estimate has not yet been updated, I see no reason for any change except for the effects of inflation. Thus, the final cost of this measure would be, I believe, a very modest cost to pay to ensure that veterans, their survivors, and other claimants before the VA are given a full and fair opportunity to have their claims for statutory benefits reviewed and evaluated as well as to challenge VA policies, regulations, guidelines, and legal interpretations.

COMPARISON OF S. 11 AND S. 2292

The most significant difference between S. 11 and S. 2292, both in philosophic and real terms, is the inclusion in S. 11 of provisions for judicial review of a final decision of the Administrator that is adverse to a claimant in a matter involving a claim for benefits under any law administered by the VA. S. 2292 would continue the current prohibition of any such review except to the extent a claimant wishes to challenge a regulation.

Addressed in both bills is the concern, as repeatedly expressed by various veterans organizations as well as the VA itself, about intrusion by a federal court into the VA's fact-finding process. S. 2292's answer to this concern is to exclude any review of an individual's claim, except on the rare occasion where the lawfulness of a regulation is at issue. Such an approach, however, fails to identify or understand one of the fundamental reasons for judicial review: The need for an avenue of independent review for claimants who are the victims of errors which are so egregious and lacking in a rational basis in the evidence that a manifest and grievous injustice to the claimant would result if the findings by the VA were not set aside.

S. 11's approach recognizes, as does Senator Murkowski in his introductory statement on S. 2292, that on some occasions errors are made by the VA which result in the unlawful denial of benefits to veterans or other claimants. The review under S. 11 allows for the correction of those errors by providing review of legal issues and, if the case meets a very demanding standard, a review of the facts.

Nevertheless, the standard for court review of factual issues in S. 11 is a very restrictive one. I know of no other agency that is subjected to such a narrow standard. Review of most agencies is conducted according to the provisions of the Administrative Procedural Act (A.P.A.) which provides a scope of review that is much broader -- that of the "substantial evidence" test. The S. 11 provision was written to allow the VA the greatest freedom from interference in its factual determinations, while providing a measure of hope and justice for the individual claimant's case that fits within the narrow category. Prior Committee reports have been very careful and clear to state that a court is not to substitute its judgment for that of the VA except in those very narrowly defined circumstances, when justice demands it -- and only then after first remanding the case to the BVA

S. 2292 would provide for review of regulations by the BVA prior to a review by the courts. Such a proposal raises concerns about overburdening the BVA, which currently takes an average of 400 days to reach a decision on a case; about asking BVA members, one third of whom are physicians, to make the type of legal decisions (i.e. ruling on the lawfulness of regulations or the correctness of the General Counsel's interpretation of applicable law) for which few have specific training; about a veteran possibly receiving divided representation before the BVA -- from a service officer on factual issues and a lawyer on legal issues; and about adding an unnecessary layer to the process of a veteran receiving a final determination on a legal issue.

As noted above, S. 2292 would allow a veteran or other claimant to pay an attorney more than $10 after a notice of disagreement had been filed. The attorney could then be paid for representing the claimant in front of the BVA. Theoretically, the representation would be limited to legal issues, but in reality would more likely expand to include all issues in the case. Such a system raises a number of concerns, including the desirablity of attorney involvement at this stage of the claim and the possibility of disparate treatment. The veteran who wishes to challenge a regulation could pay an attorney to represent him with regard to that challenge and also receive representation on the factual issues, whereas a veteran who does not opt to challenge a regulation or can't find one to challenge would have no right to pay an attorney more than $10 for representing the veteran's entire claim. This could lead to the filing of non-meritorious challenges to regulations in order to secure paid representation by an attorney. Moreover, I see only delay and added expense as the outcomes of having the BVA rule on questions of law since I believe it is highly likely that the Government would appeal if it lost on a legal issue and that the veteran's counsel would appeal if the Government won, especially if the attorney was going to take the case to court to begin with. These are areas which warrant further exploration.

Lastly, S. 2292 seeks to reform the BVA and give it more independence. I think this is a laudable goal, and, as discussed earlier, I believe the BVA needs some fixing. I am not convinced, however, that the proposals contained in S. 2292 are necessarily the best ways to go about it. Both the G.A.O., at the level of the regional offices, and the Committee, at the level of the BVA, are undertaking in-depth reviews of VA claims adjudication processes. I expect that these reviews will offer much insight into how these processes can and should be improved.

In summary, the reason I continue to propose S. 11 is to provide access to justice for veterans as a matter of fundamental fairness.

INTRODUCTORY STATEMENT IN SUPPORT OF S .11
A BILL TO PERMIT JUDICIAL REVIEW OF VETERANS' CLAIMS

BY SENATOR SPARK M. MATSUNAGA
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES SENATE
THURSDAY, APRIL 28, 1988

THANK YOU, MR. CHAIRMAN.

I'D LIKE TO EXTEND MY WELCOME AND THANKS TO THE MANY WITNESSES WHO HAVE AGREED TO TESTIFY BEFORE THE COMMITTEE ON THE IMPORTANT MATTER OF JUDICIAL REVIEW OF VETERANS' BENEFITS CLAIMS.

AT THE OUTSET, LET ME COMMEND YOU, MR. CHAIRMAN, FOR THE ROLE YOU HAVE PLAYED IN KEEPING THIS ISSUE ALIVE. YOU AND OUR FORMER COLLEAGUE FROM COLORADO, SENATOR HART, ALONG WITH THE RANKING MINORITY MEMBER, SENATOR MURKOWSKI, AND FORMER CHAIRMAN SIMPSON, HAVE BEEN THE PRINCIPAL FORCES BEHIND THIS COMMITTEE'S CONTINUED EFFORT TO ENACT JUDICIAL REVIEW LEGISLATION. IN FACT, UNDER YOUR AND SENATOR MURKOWSKI'S LEADERSHIP, WE'VE FAVORABLY REPORTED JUDICIAL REVIEW BILLS FOUR TIMES, AND EACH TIME THE SENATE HAS APPROVED OUR RECOMMENDATION BY PASSING THE MEASURES. UNFORTUNATELY, YEAR AFTER YEAR, THE BILLS HAVE BEEN KILLED IN THE HOUSE. MR. CHAIRMAN, I FEEL IT IN MY BONES THAT JUDICIAL REVIEW IS INEVITABLE; MAYBE WE WILL BE LUCKY THIS YEAR AND THE HOUSE WILL SEE THE LIGHT ON THIS MATTER.

I WANT TO EXPRESS MY STRONG SUPPORT FOR S.11, INTRODUCED BY CHAIRMAN CRANSTON AT THE BEGINNING OF THE 100TH CONGRESS, OF WHICH I AM AN ORIGINAL COSPONSOR ALONG WITH OTHER MEMBERS OF THE COMMITTEE. I THINK THIS LEGISLATION IS LONG

OVERDUE. VETERANS SHOULD NOT BE VIRTUALLY THE ONLY GROUP OF FEDERAL BENEFICIARIES WHO ARE DENIED THE RIGHT OF DUE PROCESS BECAUSE THEY LACK THE RIGHT OF JUDICIAL REVIEW; NOR SHOULD THEY BE WITHOUT THE BEST LEGAL ADVICE SIMPLY BECAUSE OF AN OUTDATED LAW WHICH LIMITS THE AMOUNT THEY CAN PAY ATTORNEYS FOR REPRESENTATION IN THE CLAIMS PROCESS.

CRITICS ARGUE THAT S.11 WOULD UNDERMINE THE NON-ADVERSARIAL NATURE OF THE VA CLAIMS ADJUDICATION PROCESS AND CREATE IN ITS STEAD A CONFRONTATIONAL, HIGHLY BUREAUCRATIC, TIME-CONSUMING, AND COSTLY SYSTEM IN ITS STEAD. I BELIEVE THESE FEARS ARE LARGELY GROUNDLESS. S.11 HAS BEEN CAREFULLY CRAFTED TO MAINTAIN THE INTEGRITY OF THE VA CLAIMS PROCESS. I WISH TO POINT OUT THE BILL PERMITS A VETERAN ONLY TO PETITION THE COURTS TO REVIEW THE VALIDITY OF HIS APPEAL; IT DOES NOT REQUIRE THAT THE COURTS ACTUALLY REVIEW AND ADJUDICATE EVERY CASE THAT IS PRESENTED TO THEM. ON THE OTHER HAND, IT ALLOWS THE MOST DESERVING APPEALS TO BE CONSIDERED BY AN OUTSIDE AUTHORITY, ALBEIT UNDER RELATIVELY NARROW GUIDELINES.

SENATOR MURKOWSKI HAS OFFERED A DIFFERENT APPROACH TO JUDICIAL REVIEW WITH HIS LEGISLATION, S.2292, WHICH IS MORE PALATABLE TO SOME OPPONENTS OF S.11, INCLUDING THE DAV AND VFW. ALTHOUGH I COMMEND THE RANKING MINORITY MEMBER FOR HIS LEADERSHIP ON THIS ISSUE, I HAVE STRONG RESERVATIONS ABOUT THE SECTION OF HIS BILL WHICH CALLS FOR THE BOARD OF VETERANS' APPEALS TO REVIEW AGENCY REGULATIONS. AS FAR AS I KNOW, THE QUALIFICATIONS OF THE BVA'S 65 MEMBERS DO NOT INCLUDE COMPETENCE TO DEAL WITH THIS HIGHLY JURIDICAL FUNCTION. MORE

IMPORTANT, PERHAPS, I FEAR THAT THE PROVISION IN S.11 WHICH WOULD PERMIT COURTS TO REVIEW, IN A LIMITED WAY, QUESTIONS OF MATERIAL FACT, WOULD BE COMPROMISED BY S.2292. THE MURKOWSKI LEGISLATION, IN FACT, WOULD NOT PERMIT OUTSIDE REVIEW OF EVEN THE MOST EGREGIOUS ERRORS OF FACT MADE BY THE VA DURING THE PROCESSING OF A VETERAN'S CLAIM.

MR. CHAIRMAN, HAVING EXPRESSED MY SUPPORT FOR S.11 AND MY RESERVATIONS CONCERNING S.2292, I WOULD LIKE TO URGE THE COMMITTEE, AFTER HEARING FROM OUR WITNESSES, TO WORK TOWARD DEVELOPING BIPARTISAN LEGISLATION THAT INCORPORATES THE BEST ELEMENTS OF BOTH BILLS. HOWEVER, I URGE THE COMMITTEE NOT TO FORSAKE THE ORIGINAL PRINCIPLES OF DUE PROCESS AND FAIR REPRESENTATION THAT ARE EMBODIED IN S.11. VETERANS SHOULD BE ABLE TO ENJOY THE CONSTITUTIONAL AND LEGAL RIGHTS THAT ARE ACCORDED THE REST OF THE NATION'S CITIZENS.

THANK YOU, MR. CHAIRMAN.

# # #

OPENING STATEMENT OF SENATOR GRAHAM BEFORE THE SENATE VETERANS' AFFAIRS COMMITTEE, APRIL 28, 1988

GOOD MORNING, MR. CHAIRMAN. FOR THIS MORNING'S HEARING ON JUDICIAL REVIEW YOU HAVE ASSEMBLED AN IMPRESSIVE PANEL OF WITNESSES AND I WOULD LIKE TO THANK THEM FOR PARTICIPATING TODAY.

BEFORE I MAKE MY BRIEF OPENING REMARKS, I'D LIKE TO SAY HERE, IF I MAY, THAT I LOOK FORWARD TO THE FINAL PASSAGE OF THE CONFERENCE REPORT ON H.R.2616, THE OMNIBUS VETERANS HEALTH CARE BILL THAT BOTH HOUSES AND BOTH SIDES OF THE COMMITTEE WORKED SO LONG AND HARD ON. IT IS A GOOD BILL AND ONE THAT I AM PROUD TO HAVE BEEN PART OF THE MAKING OF. MY THANKS TO BOTH THE CHAIR AND THE RANKING MEMBER, AS WELL AS COMMITTEE STAFF, FOR THEIR EFFORTS.

JUDICIAL REVIEW IS NOT A PARTISAN ISSUE. BOTH BILLS THAT THE COMMITTEE WILL HEAR TESTIMONY ON TODAY WERE FASHIONED WITH THE WELFARE OF THE VETERAN IN MIND. AND REGARDLESS OF THEIR POSITION -- PROPONENT OR OPPONENT OF JUDICIAL REVIEW -- I AM SURE THAT ALL OF THE WITNESSES HERE TODAY HAVE ONLY THE VETERANS' BEST INTEREST IN MIND. FOR THAT REASON, I AM SECURE IN THE KNOWLEDGE THAT WHATEVER BILL THIS COMMITTEE EVENTUALLY REPORTS OUT ON JUDICIAL REVIEW, IT WILL BE A BILL THAT STRIVES TO PUT VETERANS FIRST.

BOTH BILLS, I BELIEVE, DESERVE OUR CAREFUL ATTENTION. AS A NEW MEMBER OF THIS COMMITTEE, I AM FAMILIAR WITH THE HISTORY OF JUDICIAL REVIEW LEGISLATION IN THE CONGRESS, BUT IT IS A PLEASURE FOR ME TO HAVE THE OPPORTUNITY TO BE A PARTICIPANT IN THE DISCUSSIONS WE WILL HAVE ON THIS IMPORTANT TOPIC. I THANK THE CHAIR.

PREPARED STATEMENT OF SUSAN D. BENNETT[1]
before the
COMMITTEE ON VETERANS' AFFAIRS
of the
UNITED STATES SENATE

April 28, 1988

Mr. Chairman and Members of the Committee:

Thank you for providing us with the opportunity to comment on behalf of the Public Interest Law Clinic (PILC) concerning S.11 and S.2292. PILC is a law school legal services clinic, in which another attorney and I supervise between thirteen and sixteen law student interns a year in the representation of between sixty and a hundred veterans. Since its inception in 1979, PILC has represented hundreds of veterans in the final adjudication of their claims for benefits before the Board of Veterans Appeals (BVA), and has also worked extensively with veterans all over the country in the development of their cases before the VA's Regional Offices (VAROs). Although our case load includes the claims of veterans of all eras, a majority of our clients served during the period of the Vietnam conflict.

We support S. 11 as it implements the concept of federal district court review of BVA denials in individual benefits cases. S.11 addresses significant problems which we have encountered in our individual clients' cases, problems occurring both in the BVA's adjudication practices and in the actual content of its decisions. As S.11's reforms fall basically into three categories - revisions of the administrative adjudicative process, definition of the scope of judicial review, and modification of the "ten dollar limit" - we will comment on each group of changes in turn. We will then evaluate briefly S. 2292, which we see as extending no substantial benefit to veterans, and will comment on the desirability of providing review in the federal district courts as opposed to the federal circuit courts of appeal.

I. The Revisions of Current Adjudicative Processes

S.11 introduces three commendable innovations: the option for the claimant to request an independent medical expert's (IME) opinion to reconcile "substantial" differences in physicians' diagnoses; the opportunity for the claimant to send interrogatories to VA personnel; and more elaborate criteria for the contents of BVA decisions. For the most part, we support these changes. Our experiences suggest to us that their adoption will enhance the rationality and openness both of VARO and of BVA decision-making.

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[1] Assistant Professor of Law; Director, Public Interest Law Clinic of the Washington College of Law of the American University, Washington, D.C. I wish to acknowledge the significant assistance of Marilyn Jones, second year law student and intern in the Public Interest Law Clinic, who compiled the client case histories from which I draw my examples.

38 U.S.C.§4009(a) already allows the Board to seek an IME opinion in the event of "controversy"; §107 of S.11 expands this option by enabling the claimant to request such an opinion. The Board frequently bases its denial or remand of our clients' compensation claims on its perception of a divergence in medical opinion. As we will discuss below, these denials often rest on selective reliance on isolated unfavorable diagnoses, in contravention of the "reasonable doubt" doctrine. The Board's remands typically ensue from already fully developed medical records in which the overwhelming weight of the evidence supports the claimant's position, and in which the procuring of yet more medical opinion results in duplication of effort and delays of between one and two years. The proposed §4009(c) will require the Board either to reveal and attempt to rectify its reservations about the medical record before it makes its decision,or, if it denies the request for an IME opinion, to state for the record why it believes the medical record to be unambiguous. This measure should assist in clarifying the record and avoiding the delays inherent in the remand process. Our only reservation about §107 is that, for the first time, it explicitly witholds from the claimant the chance to appeal the denial of the request for the IME opinion.

Proposed §108, the new 38 U.S.C.§4010, basically codifies existing practice, with the important exception of the new subsection (c)(1)(F), which allows claimants to direct interrogatories to VA personnel. Each BVA and VARO Rating Board section includes one medical member, who both serves as that section's medical expert and in every way acts as a voting Board member. [2] Unlike the Social Security adjudication system, in which the medical expert called by the Administrative Law Judge is subject to the claimant's cross-examination and to voir dire about his or her qualifications, the VA system allows medical experts to incorporate their off-the-record,and therefore unrebuttable, assumptions into the adjudication process. The system also encourages the BVA's medical section members to engage in ex parte communications with other medical members on individual case decisions[3]. Proposed §4010(c)(1)(F) would at least allow claimants to raise the issue of the relevance of the qualifications of the medical members, and to ask for documentation of any off-the-record sources of information which may have entered into the members' decisions.

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[2] Composition of VARO Rating Boards is set by the Department of Veterans Benefits Manual M21-1, Adjudication Procedure, at Chapter 45, ¶45.01. The Board of Veterans Appeals Manual, MBVA-1,Appellate Procedure for Professional Services, Chapter 2, ¶2.02 similarly sets the composition of each Section.

The ability to check into the medical sources of the Boards' opinions becomes crucial in complex cases, such as those involving claims of illness arising from radiation exposure.In 1983, one of our clients died of colon cancer, thirty-seven years after he served in the Pacific aboard one of the ships used as targets in the atmospheric atomic tests known as "Operation Crossroads." Before his death he applied six times, unsuccessfully, to the BVA for service connection for the rashes, swelling, kidney failure and cardiovascular complications which began shortly after his exposure to the radiation, complications which resulted in the amputation of one leg. Each time, his claim was denied for failure to prove film badge exposure to a degree of radiation deemed sufficient to correlate with these diseases, even though the film badge method has been discredited and our client did not in fact wear a film badge.

When our client's widow continued the claim before the BVA, this time for survivor's benefits, we attempted through FOIA requests to ascertain the basis of the opinion issued by the BVA's independent medical expert pursuant to 38 U.S.C.§354 and 38 C.F.R.§311b. We received no response from the expert, who had in fact been directed by the Chief Benefits Director to ignore any such requests; instead, a reply from the Chief Benefits Director referred us to the claims file.Therefore we could not ascertain the degree of the expert's reliance on the Defense Nuclear Agency's film badge reconstructions. Operation of the proposed §4010(c)(1)(F) would have enabled us to seek a more adequate response.

We do question that portion of §4010(c)(3) which subjects the process of answering interrogatories to the same protective order provisions used in federal court practice. We envision long delays in adjudication pending resolution of VA invocation of its "deliberative process privilege". This provision does not serve the otherwise clear goal of the legislation to provide claimants better access to information material to the adjudication of their claims.

We strongly support that part of §105 of S.11 which substitutes for the old 38 U.S.C.§4004(d) new standards for the content of BVA decisions. Old §4004(d) merely requires separate statements of findings of fact and conclusions of law, which is exactly what our clients' BVA decisions deliver: descriptions of the evidence presented on appeal; set paragraphs quoting or paraphrasing the generally applicable statutory or regulatory provisions; and conclusions which in no way connect the stated law with the facts. Despite its admonition to Board sections to explain the bases for their decisions, the MBVA-1 clearly encourages this rote recitation of the law by prescribing the use of "Standard Paragraphs" in decisions.[4]

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[3] See the attached Memorandum, dated January 8, 1986.

As an example of this practice, we have attached a copy of a denial of service connection for Post Traumatic Stress Disorder (PTSD) in a client's case. The decision shows only the most superficial connection between the paragraphs listed as illustrative of the law being applied and any discernible application of any standard.[5] In compelling the Board to release its reasons for decision, and in particular to delineate what the Board considers to be "matters of discretion", the proposed §4004(d) would induce greater effort on the Board's part to explain what facts supported its choice of legal conclusions.

What is most notable about these provisions is that they confront abuses which result directly from the absence of judicial review. It is axiomatic in administrative law that, even when a court is applying the highly deferential "arbitrary and capricious" standard of review contemplated in S.11, it will demand that the agency provide enough discussion of its reasoning in its decision for the court to reach conclusions about the accuracy of the agency's fact-finding and the correctness of its application of law.[6] In the absence of judicial review, there is no incentive for the BVA to offer this type of analysis. The revision proposed for §4004(d) would improve the quality of BVA decisions, and also would make such review possible. The other revisions discussed above would serve a similar purpose of clarifying how the BVA reviews and compiles the factual record, aspects of procedural accountability for which, again, there is little pressure without judicial review.

These measures should assuage the fears of those who predict an avalanche of litigation in the wake of judicial review. If in fact the BVA is required to substantiate its decision - making processes in the ways set forth in S.11, the instances of arbitrariness for which judicial review has seemed the only remedy may diminish, and only the most egregious cases will find their way to federal district court. These sections of S.11 do not eliminate the need for judicial review; without that ultimate sanction, these correctives too will have little force.

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[4] See MBVA-1, Chapter 9, ¶9.15, which refers members to the "Dictation Handbook" for the content of the "basic statutory and regulatory provisions which are most frequently used." But see also ¶9.16, which cites the requirement imposed in 38 C.F.R.§19.180(c) that the Board set forth the reasons for its decisions.

[5] We have deleted the client's name, "C -file number", and any other conspicuously identifying information, to preserve confidentiality.

[6] For discussions of this concept of sufficiency in the context of federal district court review of decisions of the Boards for Correction of Military Records, to which the standard of "arbitrary and capricious" applies, see Istivan v. U.S., 689 F.2d 1034 (Ct. Cl.1982); Matlovich v. Secretary of the Air Force, 591 F.2d 852 (D.C.Cir.1978).

II. The Scope of Judicial Review

In allowing the reviewing court to set aside agency action for constitutional violations, abuse of discretion, or for baseless findings of material fact, proposed §4026 preserves rights of review already recognized for veterans, and creates essential new ones. [7] The only vehicle now available to the veteran seeking review of a legally or factually erroneous BVA decision is a request for reconsideration. This offers no meaningful relief; the grant of a reconsideration review is discretionary,[8] and half of the panel assigned to review the veteran's allegations consists of the three panel members whose decision is being attacked.[9]

Based on our observations of BVA practices, we can attest to the necessity for allowing review of witheld agency action, unsubstantiated findings, and capricious decisions. Several examples of agency action should suffice to demonstrate the need. One of our clients, a heavily decorated veteran who served as a combat medic during the Tet Offensive, suffered from PTSD rated by the VA at 30% disabling. Multiple psychiatrists'reports compiled during his frequent hospitalizations for suicidal ideation attested to the graphic nature of his flashbacks, to his isolation, and to the profundity of his depression. In his pro se appeal of the VARO's rejection of his request for an increase in his rating, he stated the following: "I believe I should get 80% compensation and be able to file for unemployability until I get better." Since our client did not fill out a special VA form 29-8140, the VARO failed to certify the "unemployability" issue to the BVA as a separate claim under 38 C.F.R.§4.16.[10] Despite the claimant's own testimony on the unemployability issue,and his physicians' assertions that he was totally disabled and unemployable, the BVA refused to entertain the total disability claim. The chair of the BVA denied our request for rehearing.Last month, our client testified at another BVA hearing, this time on the "properly certified" issue of unemployability - two years and three months after he thought he had applied for this benefit at the VARO. We have recently encountered at least two other instances in which, due to the VAROs' failure to certify issues which the clients clearly raised on appeal, the BVA had refused to consider the issues. §4026(a)(1)(B) would have provided our clients some real redress against such "wrongfully witheld" agency action.

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[7] In allowing a court to vacate BVA decisions which violate constitutional rights, §4026(a)(1)(C)(ii), which exceed the BVA's statutory authority, §4026(a)(1)(C)(iii), or which violate due process, §4026(a)(1)(C)(iii), S.11 restates acknowledged exceptions to the preclusion of judicial review. See Johnson v. Robison, 415 U.S.361 (1974). The Supreme Court's recent decision in Traynor v. Turnage, No. 86-622, slip op. at 8-9 (U.S. Supreme Court, April 20, 1988) acknowledges the possibility of judicial review of certain claims, but limits its holding to claims concerning the legality of VA law or regulation in the context of the Rehabilitation Act. See Traynor, id., at 8, n.9, for a listing of cases in which lower courts have held that 38 U.S.C.§211(a) presents no bar to statutory challenges to VA regulations. However, given the VA's history of challenges to the right of veterans to seek redress of constitutional grievances in court, reiteration of the principle may serve some purpose. See McKelvey v. Turnage, 792 F.2d 194,199 (D.C.Cir.1986) for the court's discussion of the VA's "switched off, then on" approach to the application of §211(a).

[8] Under 38 C.F.R.§19.185, "Reconsideration of an appellate decision may (emphasis supplied) be accorded at any time...."

[9] 38 C.F.R.§19.190(a).

Other clients' cases illustrate instances of arbitrary action and of unsupported findings of fact, both of which S.11 would address. In the example mentioned in our discussion of proposed §4004(d),the BVA did not explain why it based its denial of service connection for PTSD on two medical opinions diagnosing features associated with PTSD, or why these opinions were more credible than the three more recent opinions confirming PTSD. Other BVA decisions have turned on unexplained rejections of diagnoses favorable to the veteran's claim and selective focusing on detrimental evidence in the record.[11] In other cases, the Board has applied standards nowhere in evidence in the regulations; one client was denied an increase in a rating for service-connected PTSD in part because he participated in an action to gain custody of his children. Other cases have turned on pure misreadings of the record, misreadings which the Board has refused to correct on reconsideration.[12] As we stated previously, there is now no meaningful route for correction of these errors.

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[10] 38 C.F.R.§4.16 allows the award of the equivalent of 100% compensation for a veteran whose service connected disabilities may warrant less than a 100% rating according to the disability schedules, if those disabilities render the veteran unemployable. Given the difference in compensation between the 70% rating, at $652 per month, and a total rating, at $1412, the award of total disability to a veteran unable to secure any other means of income assumes great financial significance.

[11] We have attached a copy of a June, 1987 BVA decision for one of our clients, which illustrates these points. The client's name and C-file number have been deleted.

We wish also to address our limited objections to the content of §302 (a) of S.11. Although we are sensitive to the concerns of those who do not wish to leave any particle of fact-finding authority to the reviewing court, we oppose any sections extending what we consider to be the Board's already abused power of remand. §4027 allows one remand on the Administrator's motion after the filing of a complaint. Even granted that the action returns to the court after ninety days, we fail to see at that point what additional development or analysis the VA could perform. Eleven of the thirty two BVA decisions which our clients received during fiscal 1987 were remands. Several of these cases were remanded for additional VA diagnoses, in records already replete with VA diagnoses supporting the veterans' claims; others were remanded for VARO collection of unit records which we had already submitted to the claims file. One VARO has admitted to losing our client's file on remand, resulting in the delay of a year in the development of the requested new evidence. Even in cases in which the VARO does not misplace the file, the average time between BVA remand and scheduling of the BVA re-hearing on the new evidence is sixteen months. Any protection which this new section affords to the VA's fact-finding authority is outweighed by the substantial prejudice that any increase in the VA's remanding authority will work against any veteran's case.

III. Repeal of 38 U.S.C.§3404

Although we applaud the removal of the automatic bar to fees in cases in federal district court, we are concerned about the retention of the $10 limit in representation up to and through the final adjudication of a case by the BVA. By keeping the $10 limit to fees, new §3404(c)(1) does no more than perpetuate the status quo. The new law provides no greater incentive to attorneys to take veterans' cases through the administrative stage. Contrary to what opponents of greater freedom for the veteran in negotiating fees maintain, lawyers are needed in the VA system.

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[12] A particularly egregious case involved the extension of the ten year statute of limitations from the date of the veteran's discharge for the use of VA educational benefits. The statute can be tolled upon evidence of physical or emotional problems which would have made use of the benefits medically unfeasible. One of our clients suffered severe schizophrenic delusions upon his discharge from the service, delusions which incapacitated him for several years from continuing his education. The Board initially denied his request for more time to use the benefits, in part based on its findings that he had sought no treatment for mental disorder during the service. This finding ignored pointed evidence to the contrary; the client had received a clear pre-discharge diagnosis of significant decompensation and emotional instability.

It is disingenuous to claim that the infusion of more lawyers will add unwelcome adversariality to the VA system. The system is already fraught with adversariality - with exacting rules of pleading and practice of which the lay claimant cannot possibly be aware. As the present and proposed 38 U.S.C.§4005(d)(5) provide, a claimant may find his claim dismissed for inadequate statement in his substantive appeal of the VA's errors of fact or law. 38 C.F.R.§19.123 further requires that the claimant refer in his substantive appeal to disputed sections of the agency's Statement of the Case. Under 38 U.S.C.§4005(d)(4), as in many state rules or in the Federal Rules of Civil Procedure, any VA contention in the Statement of the Case which the veteran fails to rebut is deemed admitted. Our illustrations from our own cases show that failure to follow the VA's rules of pleading can severely compromise a claim. For these tasks, a lawyer is needed. Where judicial review will be based on evidence of record, it becomes even more crucial for the veteran to be able freely to hire his own attorney, so that he will benefit from essential assistance in developing the record fully.

IV. S.2292 and the Review of Cases in the Courts of Appeal

Of the provisions contained in S.2292, we support its repeal of §3404 to allow limited fees for representation of a claim after the agency issues its Statement of the Case. We believe that the $500 upper limit may be unduly low, and oppose in principle any restriction on the veteran's ability to negotiate his own fee arrangements.

With regard to the other provisions of S.2292, the bill is clearly motivated by a desire to avoid any possibility that a court might usurp the agency's fact-finding function. We believe that this excess of caution is unnecessary. For a court to review the evidentiary bases for the BVA's conclusions of fact is not equivalent to an independent fact-finding exercise. For reasons which we stated previously, we feel that autonomous review of issues specific to individual factual and legal determinations is essential to the integrity of each claim. S.2292's limitation of review to the validity of regulations remedies none of the deficiencies which we have discussed in the BVA's decision-making processes.

S.2292 places its limited review function in the U.S.Courts of Appeal. For primarily practical reasons, we feel that review of BVA decisions, whether under S.11 or S.2292, will be more expeditiously accomplished in federal district courts. Federal district judges, or the magistrates to whom they delegate responsibility, already have significant experience in adjudicating Social Security claims under 42 U.S.C.§405(g), based on a system of record review similar to that contemplated in S.11. The federal district courts would also offer more flexibility in scheduling and docketing than would the Courts of Appeal.All Courts of Appeal cases are reviewed by and argued before three-judge panels,usually on a fairly rigid timetable for briefing and argument. The different remand provisions of S.11 assume a tribunal equipped to make a number of interim decisions in relatively short periods of time. Individual district court judges are accustomed on such a timetable to remanding cases to the originating agencies for fact-finding or clarification of the record; Courts of Appeal panels are not. All these considerations militate in favor of allocating the duty of review to the district courts.

Veterans
Administration

Memorandum

Date January 8, 1986

To All Chief Members

From Deputy Vice Chairmen

Subj BVA Medical Specialties & Expertise

1. During the course of decision preparation and review, it is often helpful to have access to a BVA physician who has particular knowledge or expertise concerning a medical specialty or certain administrative procedures or who has useful contacts with other offices/agencies. All the physicians listed below have expressed a willingness to be consulted when questions arise in the designated subject areas. It is strongly suggested, however, that when an attorney-adviser desires to utilize the services of the Medical Member of a section other than his/her own, this be cleared through the Chief Member of that section.

2. Medical Specialty	Physician(s)
Aerospace (Aviation) Medicine	Dr. Datlow
Congenital Diseases	Dr. Imburg
Dermatology	Drs. Hinrichsen and Simpson
EKG Interpretation	Drs. Castellot, Sterling and Yeager
Gastroentology	Dr. Piedra
Hepatology	Dr. Piedra
Hyperbaric Medicine	Dr. Selfon
Industrial/Occupational Medicine	Drs. Portaria, Selfon and Yeager
Infectious Diseases	Drs. Mastrota and Simpson
Internal Medicine	Drs. Castellot, Datlow, Imburg, Prats, Sterling and Yeager
Malnutrition Residuals	Dr. Imburg
Neurology	Drs. Edwards and Salan
Opthalmology	Dr. McAllister

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Orthopedics	Dr. Yeager
Psychiatry	Drs. Caffey and Hinrichsen
Pulmonary Medicine (incl. Pulmonary Function Test Interpretation)	Drs. Ang, Klepser and Quarles
Surgery, General	Drs. Brown, Klepser and Leeper
Surgery, Cardiac and Thoracic	Dr. Klepser
Surgery, Gynecological	Drs. Brown and Leeper
Urology	Dr. Peiser
Venereal Diseases	Drs. Hinrichsen and Leeper

3. Medical Administration and Contacts

Civil Service	Dr. Prats
Military Disability Evaluation System	
Air Force	Dr. Salan
Navy	Dr. Imburg
Social Security Administration	Dr. Salan
VA Central Office - DM&S	Drs. Castellot and Selfon

4. Please contact Mr. Standefer or Mr. Landers if any revisions of the above listings are desired.

RICHARD B. STANDEFER
Deputy Vice Chairman
Appellate Group I

David T Landers
DAVID T. LANDERS
Deputy Vice Chairman
Appellate Group II

IN THE APPEAL OF

VETERANS ADMINISTRATION 1930

BOARD OF VETERANS APPEALS
WASHINGTON, D.C. 20420

FINDINGS AND DECISION	)	DOCKET NO.	85-00 382
	)		
	)		
	)	DATE	JAN 22 1986

THE ISSUE

1. Entitlement to service connection for an acquired psychiatric disorder, including a posttraumatic stress disorder.

2. Entitlement to service connection for a gastrointestinal disorder.

3. Entitlement to service connection for a knee disorder.

4. Entitlement to service connection for a back disorder.

REPRESENTATION

Appellant represented by: Susan Bennett, Attorney

WITNESSES AT HEARINGS ON APPEAL

The appellant.

CONSULTATIONS BY THE BOARD

M. B. O'Donnell, Staff Legal Adviser

086009

ACTIONS LEADING TO PRESENT APPELLATE STATUS

In addition to the issues already noted, the veteran originally appealed the denial of entitlement to service connection for seizures, headaches, and hepatitis as well as a denial of entitlement to a permanent and total rating for pension purposes. At the hearing on appeal before the Board, the representative withdrew these issues from appellate consideration.

CONTENTIONS

The veteran and his representative contend that the veteran has a posttraumatic stress disorder which originated in combat in Vietnam; that he has a peptic ulcer disease which was incurred in service or, alternatively, is secondary to his posttraumatic stress disorder; and that he has knee and back disorders which are residuals of injuries sustained in service. They assert that the veteran's posttraumatic stress disorder is manifested by symptoms that include headaches and psychogenic amnesia. The veteran and his representative contend that the March 1983 official examination was inadequate in that the examiner took no more than 15 minutes for the examination. The representative asks that all reasonable doubt be resolved in favor of the veteran.

THE EVIDENCE

The veteran had active military service from December 1966 to October 1972, including service in Vietnam where he served as a grenadier in a rifle company. Service records reflect that the veteran was awarded the Combat Infantryman's Badge, the Vietnam Campaign Medal, and the Vietnam Service Medal.

Service medical records show that the veteran was seen in December 1967 and January 1968 with complaints of bilateral knee pain after falling from a rock. In March 1969, the veteran was seen with complaints of pain in the lumbosacral area, but only at night. No spasm or tenderness was shown. Parafon Forte was prescribed. The service medical records show no complaints, treatment, or findings referable to a psychiatric disorder or a gastrointestinal disorder. The report of separation medical examination shows normal psychiatric findings; findings with respect to the abdomen, viscera and lower extremities were within normal limits.

A September 1975 report of an upper gastrointestinal series and an oral cholecystogram showed no abnormalities of the gallbladder, esophagus, stomach, or duodenum. An August 1976 outpatient treatment record shows that the veteran was seen with complaints of epigastric pain. The diagnostic impression was that the veteran may have had a peptic ulcer disease or was just swallowing too much air. A September 1976 upper gastrointestinal series revealed a scarred duodenal bulb, suggesting old duodenal ulcer disease. The remainder of the series was within normal limits. A December 1980 upper gastrointestinal series showed minimal deformity of duodenal bulb without evidence of ulcer craters.

The veteran received a Veterans Administration psychological evaluation in February 1982. He reported blackout-type episodes in which he would lose his memory for periods of time ranging from a few minutes to approximately an hour. Upon mental status examination, the veteran was well oriented, logical, and coherent. His associations were logical and reasonable. His affect was appropriate. There were no indications of blocking and he was not circumstantial. He seemed fairly stable emotionally and reported good sociability and good relationships with his wife. His mood seemed to be adequate. He was not depressed or euphoric. The veteran was slightly anxious but with appropriate concern regarding his blackout spells. That same month, the veteran underwent psychological testing which, in the opinion of the examiner, revealed a tremendous amount of anxiety and feelings of inadequacy in his relationship with others. There were no indications of a psychosis or of an organic disorder. A February 1982 outpatient treatment record shows that the veteran had complained of loss of memory and auditory hallucinations. He admitted the occasional use of marijuana.

In a February 1982 report, Robert G. Demers, M.D., stated that he had examined the veteran; that the veteran's current symptoms were insomnia, irritability, and anxiety; that the diagnoses were episodes of altered consciousness, rule out temporal lobe epilepsy and hysteria, psychological symptoms, rule out posttraumatic stress disorder and anxiety state. It was noted that the veteran could not work as a truckdriver.

The veteran received a Veterans Administration examination in July 1982. On psychiatric examination, a history of blackout episodes, irritability, anxiety, and headaches was noted. The veteran complained of occasional restless sleep, nightmares, and irritability. Upon mental status examination, the veteran was quiet and cooperative. His speech was coherent, and his memory and judgment appeared to be adequate. The diagnosis was atypical anxiety disorder. On neurological examination, the veteran provided a history of blackouts, amnesia, nightmares, and occasional insomnia. He related one incident when he was trying to protect a fellow soldier from a Vietnamese assault and later found out that he had tried to kill the person but was prevented from doing so by his comrades. On examination, the deep tendon reflexes were somewhat diminished throughout, but obtainable and fairly symmetrical without pathologic responses. The neurological examination was otherwise within normal limits. The diagnostic impression was episodes suggestive of temporal lobe seizures with a retrograde amnesia; rage attacks which might be secondary to the seizures; and headaches, probably muscle contraction in etiology. Upon examination of the digestive system, the veteran complained of epigastric cramps immediately after meals and with prolonged sitting. On rare occasions, this had awakened him at night. He stated that he had had tarry stools a year before. He had no nausea, vomiting, diarrhea, constipation, or hematemesis. The abdomen showed no tenderness, masses, or spasm. The liver, spleen, and kidneys were nonpalpable.

On musculoskeletal examination, the veteran complained of pain in both knees at intervals. There had been no swelling or locking. The veteran indicated that on one occasion in the past the left knee "gave way." The veteran also complained of low back pain when lifting and on prolonged sitting The pain was unaffected by coughing, sneezing, or the type of weather. On examination, the knees showed no tenderness, swelling, increased heat, redness, increased joint fluid, limitation of motion, or instability. The veteran was able to walk on his heels and toes and squat without difficulty. There was no tenderness, muscle spasm, or limitation of motion of the lumbosacral spine. Straight leg raising was normal. The diagnosis was history of knee and back pain.

In a letter received in September 1982, the veteran's wife related how the veteran had changed upon his return from service. She indicated that he had nightmares during which he would strike at her. She said the veteran also threatened her on occasion and would hide her clothes.

In a September 1982 Veterans Administration outpatient mental health clinic report, it was noted that a review of the records revealed that the veteran had met the criteria for posttraumatic stress disorder, including adequate stressor, reexperiencing of the trauma with nightmares, numbing of responsiveness through periods of isolation, startle response, and pressure of irritability and possibly anxiety and depression.

The veteran received an official Veterans Administration psychiatric examination in March 1983. A history of blackout spells, seizures, and episodes of rage secondary to the seizures was noted. Mental status examination revealed a vague, evasive person. The veteran was mildly tense and agitated. There was no evidence of illusions, delusions, hallucinations, or ideas of reference. The veteran was oriented as to time, place, and person. Memory for recent and remote events was fair. Judgment, reasoning, and insight were poor. Examination revealed no reexperiencing of a traumatic event and no reacting as to the original event. There was no numbing of responses to external events and no reduced interest. There was no large change of affect, no guilt about surviving, and no memory problems. There was no recurrence of symptoms by exposure to similar events. It was determined that the veteran rarely had episodes of hyperalertness. Diagnoses were seizure disorder and episodes of hyperirritability secondary to seizures and passive-dependent personality.

In a June 1983 statement, Robert Demers, M.D., stated that in his opinion the veteran had amnesia-type episodes possibly due to a seizure disorder and possibly posttraumatic stress disorder.

In an October 1983 statement, Charles R. Vernon, M.D., stated that he had examined the veteran. The veteran reportedly chronic headaches, amnesia, impulsive rage, insomnia, nightmares, attacks of intense fear, as well as knee and back pain. It was noted that the veteran was depressed, primarily because he was unemployed. Diagnoses were posttraumatic stress disorder and temporal lobe seizures.

The veteran testified at his May 1984 hearing on appeal. He related his combat experiences in Vietnam and described difficulties he has experienced following his return from Vietnam, including difficulty sleeping, reacting to the sound of airplanes or popping noises, social isolation, hot temper, and nightmares. He stated that he had come close to killing his wife. He testified that before service he used to like to hunt and fish, but now he only wanted to fish. The veteran described how he injured his back and the knee in service and related that he had experienced gastric pain in service. The veteran's wife testified how the veteran had changed after service, including having interrupted sleep with nightmares and making threats against her. Also testifying was Elaine Durham, a private clinical social worker. She stated that the veteran had all of the symptoms of posttraumatic stress disorder. The proceedings of the hearing on appeal have been transcribed and are of record.

On file are copies of progress notes from May 1983 to May 1984 prepared by Elaine Durham concerning her interviews with the veteran.

The veteran testified at his October 1985 hearing on appeal before the Board. This testimony was consistent with that at the earlier hearing. He described memory lapses, amnesia episodes, and nightmares since his return from Vietnam. He indicated how he almost killed his wife on one occasion. The veteran stated that he went on sick call several times in service for stomach cramps. He said that he was never told in service that he had an ulcer. He said shortly after service he went to a private physician for back and knee pain as well as for stomach pain. He indicated that he had difficulty holding jobs. He stated that he frequently fell asleep during the daytime watching television. The veteran's wife testified consistently with her testimony at the previous hearing on appeal. She also said that the veteran had shot at her several times. She stated that the veteran liked to be alone and that he wondered whether he had ever killed any babies in Vietnam. She added that the veteran sometimes said that he should have been killed in Vietnam. Elaine Durham's testimony was consistent with previously advanced testimony. She stated that she used to see the veteran once a week in therapy sessions. She said the veteran stayed inside because he could not control events outside, e.g., he might get in a fight. She stated that the veteran had a potential for violence. Finally, she testified that in her opinion the veteran had a posttraumatic stress disorder.

At the hearing on appeal, the representative submitted a detailed brief together with exhibits, including a description of a combat operation in which the veteran's unit had participated when he was assigned to it, a statement from the veteran's wife relating how the veteran had changed during service, and a Veterans Administration hospital summary. The summary shows that the veteran was hospitalized for 19 days in April 1985 with a chief complaint of episodes of memory loss. A physical examination revealed a normal neurologic evaluation. On mental status examination on admission, the veteran was alert and well oriented. His mood was euthymic and his affect was restricted. Suicidal ideation or auditory hallucinations were not elicited. His concentration was good. His abstraction was somewhat abnormal His judgment and insight were good. On psychological testing, the veteran scored in a range which made it highly probable that he had posttraumatic stress disorder, however the symptoms were confounded by the veteran's personality disorders and his tendency to somaticize. The examiner felt that the veteran had been under a great deal of stress throughout his life and that he had not always adapted to stress in the best way. The veteran was prone toward dissociative states when under great stress or when remembering times of great stress. Discharge diagnoses included psychogenic amnesia, mixed substance abuse, posttraumatic stress symptoms, paranoid personality disorder, borderline personality disorder, and peptic ulcer disease.

THE LAW AND REGULATIONS

Service connection may be granted for disability resulting from disease or injury incurred in or aggravated by wartime service. (38 U.S.C. 310)

Congenital or developmental defects as such are not diseases within the meaning of applicable legislation providing compensation benefits. (38 C.F.R. 3.303(c))

For the showing of chronic disease in service there is required a combination of manifestations sufficient to identify the disease entity, and sufficient observation to establish chronicity at the time, as distinguished from merely isolated findings or a diagnosis including the word "chronic." Continuity of symptomatology is required where the condition noted during service is not, in fact, shown to be chronic or where the diagnosis of chronicity may be legitimately questioned. When the fact of chronicity in service is not adequately supported, then a showing of continuity after discharge is required to support the claim. (38 C.F.R. 3.303(b))

Where a veteran served ninety (90) day~~s~~ or more during a period of war and peptic ulcer becomes manifest to a degree of 10 percent within 1 year from date of termination of such service, such disease shall be presumed to have been incurred in service, even though there is no evidence of such disease during the period of service. This presumption is rebuttable by affirmative evidence to the contrary. (38 U.S.C. 312, 313; 38 C.F.R. 3.307)

When a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant. A reasonable doubt means a substantial doubt and one within the range of probability as distinguished from speculation or remote possibility. (38 C.F.R. 3.102)

DISCUSSION AND EVALUATION

For a grant of service connection for posttraumatic stress disorder, the evidence must show the existence of a recognized stressor in service that would evoke significant symptoms in almost all persons, a reexperiencing of the traumatic event, a subsequent numbing of response to or involvement with the external world, and certain other symptoms indicative of the disorder, such as survival guilt and avoidance of activities that arouse recollection of the traumatic event. The veteran undoubtedly was exposed to a recognized stressor in service. However, after careful consideration of all of the pertinent evidence, including the private medical statements reporting a diagnosis of posttraumatic stress disorder, the Board concludes that a posttraumatic stress disorder has not been established. We find it particularly significant that both the July 1982 Veterans Administration psychiatric examination and the March 1983 official psychiatric examination specifically showed that the veteran did not have a posttraumatic stress disorder. An atypical anxiety disorder was found at the first examination, and a passive-dependent personality disorder was diagnosed at the second examination. Diagnoses of posttraumatic stress disorder in the private medical reports as well as those in Veterans Administration outpatient treatment records and in the 1985 hospital summary, are not supported by the evidence. Under the circumstances, entitlement to service connection for posttraumatic stress disorder has not been established.

As noted, an atypical anxiety disorder was diagnosed in 1982. Service medical records, however, are negative as to any psychiatric disorder. Absent a showing of acquired psychopathology until long after service, service connection for an acquired psychiatric disorder has not been established. The personality disorder diagnosed in 1983 is a developmental defect and not a compensable disorder under the law.

We have noted the representative's assertion that the 1983 official psychiatric examination was inadequate. The Board, however, is satisfied that the examination is fully adequate for the purpose of evaluating the issues in this case when considered in light of the other evidence of record.

Although there is evidence that while in service the veteran experienced stomach cramps and back pain, and injured his knee, the evidence shows further that these symptoms were not indicative of chronic disorders. The report of separation medical examination reflects a normal evaluation as to the knees, back and stomach. There is evidence that the veteran had a duodenal ulcer after service. This was first shown, however, more than one year after service. Similarly there is no objective evidence suggestive of chronic disability of the knee or back until long after service separation. Under the circumstances, service connection for a back, knee or peptic ulcer disorder has not been established. Rather, we must conclude that any back, knee or gastrointestinal difficulties experienced by the veteran in service were representative of impairment which was acute and transitory in nature and resolved without ascertainable residuals.

As to the representative's assertion that the veteran has a peptic ulcer which is secondary to his posttraumatic stress disorder, that assertion is rendered moot by our determination that the veteran does not have a psychiatric disorder for which service connection is warranted.

We have considered the principle of reasonable doubt in this case but find that the facts of record raise no such doubt.

FINDINGS OF FACT

1. The veteran does not have a posttraumatic stress disorder.

2. An acquired psychiatric disorder was not present in service.

3. A passive-dependent personality disorder is a developmental defect.

4. A chronic back, knee or gastrointestinal disorder was not present in service.

5. A peptic ulcer was not manifested within one year after service.

CONCLUSIONS OF LAW

1. An acquired psychiatric disorder, including a posttraumatic stress disorder, was neither incurred in nor aggravated by service. (38 U.S.C. 310; 38 C.F.R. 3.102, 3.303(c))

2. A back or knee disorder was neither incurred in nor aggravated by service. (38 U.S.C. 310; 38 C.F.R. 3.102, 3.303(b))

3. A gastrointestinal disorder was neither incurred in nor aggravated by service nor may it be presumed that a peptic ulcer was so incurred. (38 U.S.C. 310, 312, 313; 38 C.F.R. 3.102, 3.307)

DECISION

Entitlement to service connection for an acquired psychiatric disorder is not established. Entitlement to service connection for a back disorder is not established. Entitlement to service connection for a knee disorder is not established. Entitlement to service connection for a gastrointestinal disorder is not established. The appeal is denied.

Jack W. Blasingame
JACK W. BLASINGAME

Francis M. Mastrota
FRANCIS M. MASTROTA, M.D.

J. MICHAEL JOHNSON

IN THE APPEAL OF

BOARD OF VETERANS APPEALS
WASHINGTON, D.C. 20420

FINDINGS AND DECISION	DOCKET NO.	84-28 887
	DATE	JUN 0 9 1987

THE ISSUE

Entitlement to service connection for an acquired psychiatric disorder, including post-traumatic stress disorder.

REPRESENTATION

Appellant represented by: Ronald Simon, Attorney

WITNESSES AT HEARINGS ON APPEAL

The appellant and

CONSULTATIONS BY THE BOARD

M. B. O'Donnell, Staff Legal Adviser

717209

ITEMS RELATING TO PRESENT APPELLATE STATUS

The Board in February 1986 remanded the case for further development. This has been accomplished and the case is again before us for appellate consideration.

The appellant designated the Vietnam Veterans of America as his representative, but that organization has referred him to Ronald Simon, Attorney at Law, of the American University, Washington College of Law, Public Interest Law Clinic to represent him for purposes of this appeal.

CONTENTIONS

The veteran and his representative contend that the veteran has a post-traumatic stress disorder which originated in combat in Vietnam. They assert that the veteran was severely wounded in Vietnam and has the classic symptoms associated with that disorder, including a reexperiencing of traumatic events, reduced involvement with the external world, survival guilt, sleep disturbance, and hallucinations. They ask that all reasonable doubt be resolved in favor of the veteran.

THE EVIDENCE

The veteran had active military service from June 1968 to November 1969, including service in Vietnam. Personnel records show that the veteran received the Vietnam Campaign Medal with Device, the Vietnam Service Medal with Star, the Purple Heart Medal, and the Combat Action Ribbon.

Service medical records show that the veteran sustained multiple shell fragment wounds in Vietnam. The records show no complaints, treatment, or findings referable to any psychiatric disorder. The separation report of medical examination shows no findings referable to any psychiatric disorder.

The veteran received a Veterans Administration examination in February 1970. He had no complaints which are herein pertinent.

Veterans Administration outpatient treatment records in 1981 and 1982 reflect that the veteran was seen regularly in a mental health clinic with complaints that included depression, sleep disturbance, nightmares, visual hallucinations, and paranoia. In April 1982, the veteran stated that while driving on a highway he saw "guns and people chasing him." He also complained of having bad nightmares. In June 1982, a social worker concluded that post-traumatic stress disorder was a possibility. The veteran described dreams in which he "sits up in bed and shoots a machine gun." In August 1982 psychological testing indicated a schizoid personality disorder and the possibility of schizophrenia with somatic delusions.

The veteran received a Veterans Administration psychiatric examination in October 1983. The veteran described some physical problems including headaches. He also complained of having trouble falling asleep. It was noted that he had no nightmares but frequently had scary dreams about people he had known. It was noted the veteran had no flashbacks in the daytime nor did he have startle reactions or special recollections of old wartime affairs. It was noted that about a year previously the veteran had consulted with his psychiatrist for the first time because he had been increasingly depressed as a result of his failure to work at a job he liked. The veteran was taking antidepressant medication, Amitriptyline, 25 milligrams at bedtime. On mental status examination, the veteran was quite obviously depressed. There was no sign of a thought disorder. Psychomotor functions were decreased and his facial expression was sad. He appeared to be frustrated and disgusted with life. The examiner concluded there were no significant signs indicative of a post-traumatic stress disorder. The diagnosis was chronic, moderately severe dysthymic disorder.

The veteran also received a Veterans Administration social and industrial survey. The veteran described events in Vietnam including his carrying several-day-old dead bodies and an incident in which a comrade of his was killed. He also described being medevaced with 8 to 9 dead bodies that had an unusual odor. The veteran also admitted to experiencing an initial sleep disturbance. The examiner concluded that the veteran was severely impaired socially and industrially and described symptoms which could be associated with post-traumatic stress disorder.

The veteran testified at his October 1985 hearing on appeal. He related an incident when he was wounded in Vietnam and medevaced on a helicopter which contained several dead bodies. He said the first psychiatrist he was able to relate to was a Veterans Administration psychiatrist in October 1983. He described how he was required to leave his job at a steel mill where he had worked for eight years because of fatigue brought on by lack of sleep. He described nightmares including one where he was in an automobile and the brakes failed, at which point he would awaken. In another nightmare, somebody was attacking him in bed. He described an incident when he had an explosive argument with his brother-in-law with whom he was in business and ended up assaulting him. He related another incident when his car broke down on a highway and he thought that people were following him with weapons. At that time he was arrested and charged with illegal possession of a firearm. When arrested, he was aiming the gun at his head. He described another incident when he saw skeletal faces. He said that he used to slap his first wife. The veteran indicated that he had always had nightmares, even before service. Finally, he noted that his mother had told him that he would wake up hollering and "shooting machine guns." The proceedings at the hearing on appeal have been transcribed and are of record.

The representative at the hearing on appeal submitted several statements and a copy of a Veterans Administration outpatient treatment report. In an October 1985 affidavit, the veteran's first wife testified that before the veteran went to Vietnam he was a relatively calm and good-natured person. She said that when he returned from Vietnam, he did not seem to want to talk about it very much. He did describe an incident when he saw his partner being blown to bits after stepping on a mine. She said that the veteran complained about not being able to relate to people after Vietnam. She indicated how the veteran would wake up at night screaming. She described an incident in 1974 when the veteran started smashing their furniture and beating her. He also snatched their daughter out of her arms and threw her on the carpet. When the police arrived, the veteran was stammering "I could kill her, she looks like a Vietnamese." She said it took about four policemen to keep the veteran away from her.

In an October 1985 affidavit, the veteran's brother-in-law described an incident during which the veteran, without provocation, kicked him in the side and attacked him with a vacuum cleaner. He said the veteran chased him for about 2 or 3 blocks with the vacuum cleaner still in his hand .

In an October 1985 affidavit, the veteran's fifth grade teacher stated that the veteran was always a pleasant, nonviolent, and very respectable child.

In an October 1985 affidavit, the veteran's mother testified how before Vietnam the veteran was a relatively calm, friendly, honest and hard working person. He did not have any type of criminal record before entering the service. She said that when he returned from Vietnam the veteran did not talk to her about his wartime experiences. Rather, he kept them all bottled up within him. She said that she did not notice anything different about her son until approximately 1976 when he became more irritable and became easily upset over minor occurrences. About the same time, the veteran became more seclusive. She said that at nighttime she could hear the veteran's screaming from his bedroom such things as "get away from me." She indicated that since his separation from the service the veteran no longer had the drive and initiative that he once had and could not hold a job.

Of record is a statement showing that the veteran's employment at a steel and ironworks was terminated in May 1978 for failure to report for work.

At an October 1985 Veterans Administration psychiatric evaluation, the veteran related the incident when he was wounded in Vietnam. He said that his mother told him about nightmares that he had had since his return from Vietnam. The examiner noted that the veteran's more recent nightmares represented helpless situations similar to combat situations. The examiner concluded the veteran had recurrent and intrusive recollections of his traumatic experiences in Vietnam in the form of nightmares and bad dreams and that he also had diminished interest in significant activities of his past as well as sleep disturbance and trouble concentrating. Diagnoses included post-traumatic stress disorder and major affective disorder with depression, in remission.

The veteran received a Veterans Administration psychiatric examination in April 1986. He described seeing many injured and wounded comrades. He related the incident in which he received multiple shrapnel wounds. He said he had no recollection of any other traumatic events. He complained of sleep disturbance over the previous few years which was relieved by medication. He indicated that his belief that Elavil had helped him the most. The veteran indicated that he had nightmares 2 to 3 times a week but felt they had not been much of a problem since he had been on medication. The examiner noted that the history available in the claims folder indicated that the veteran's mother's account was suggestive of more severe nightmares than the veteran himself believed. The veteran denied any flashbacks or startle responses. He also described a general interest in most activities rather than a lack of interest. The veteran also tended to have a generalized isolation and lack of socialization which was not related to just the Vietnam War experience. It was noted the veteran had some trouble in concentration but that he denied any intrusive recollections or other thoughts. On mental status examination, the veteran tended to minimize any major problems. His affect was constricted. There were no overt hallucinations, delusions, or suicidal ideation. It was noted that the veteran's thoughts were significant for feelings of hopelessness. On formal cognitive testing, mild deficits of concentration were noted. The examiner indicated that on reviewing the veteran's history and symptomatology he was led to conclude that the veteran did not appear to be extremely distressed by his Vietnam experiences, although sleep disturbance, occasional nightmares, constricted affect, with diminished interests, might meet the criteria for post-traumatic stress disorder. In his opinion, however, disturbed sleep, diminished libido, poor concentration, suicidal ideation and thoughts in the past, with feelings of hopelessness, depressed mood, and paranoia, might be more compatible with recurrent major affective disorder--depression, at times with psychotic features.

The veteran's testimony at his April 1987 hearing on appeal is consistent with his previous testimony. In addition, he testified that he had violent urges brought on by Vietnam as well as by his environment, which included poverty and living in a ghetto. He said that he would get depressed about not being able to hold a job. He testified that when he experienced pain in his arm or leg, he was reminded of

Vietnam. The veteran indicated that he felt isolated from other people. He said that he stayed in his room most of the time because he was studying--reading a dictionary--so that he could get a better job. He said that he usually liked being by himself. He stated also that he saw a girl friend once in a while.

The veteran's mother also testified at the hearing on appeal. She indicated that the veteran changed after Vietnam. She said he no longer had the drive or the will power to keep working. She indicated that his personality and his attitude toward people had changed. She related how after Vietnam the veteran had nightmares in which he relived Vietnam. She said he never told her what was bothering him. She also indicated the veteran would hide from his psychiatrist those things that were bothering him. The proceedings at the hearing on appeal were recorded.

THE LAW AND REGULATIONS

Service connection may be granted for disability resulting from disease or injury incurred in or aggravated by wartime service. (38 U.S.C. 310)

Where a veteran served 90 days or more during a period of war and a psychosis becomes manifest to a degree of 10 percent within 1 year from date of termination of such service, such disease shall be presumed to have been incurred in service, even though there is no evidence of such disease during the period of service. This presumption is rebuttable by affirmative evidence to the contrary. (38 U.S.C. 301, 312, 313; 38 C.F.R. 3.307, 3.309)

When a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant. A reasonable doubt means a substantial doubt and one within the range of probability as distinguished from speculation or remote possibility. (38 C.F.R. 3.102)

DISCUSSION AND EVALUATION

To establish service connection for a post-traumatic str disorder, the evidence must show the existence of a cognized stressor in service that would evoke significant symptoms in almost all persons, a reexperiencing of the traumatic event, and a numbing of response to or involvement with the external world, as well as symptoms that include exaggerated startle response, sleep disturbance, survival guilt, memory impairment or trouble concentrating, avoidance of activities that arouse recollection of the traumatic event, and intensification of symptoms by exposure to events that symbolize or resemble the traumatic event.

In the instant case, while the veteran may have been exposed to a recognized stressor in service, as reflected by his combat wounds, the evidence does not establish the existence of a post-traumatic stress disorder. Although the veteran does experience disturbing nightmares, the evidence does not reflect that they represent an intrusive recollection of his traumatic experiences. The veteran describes his nightmares as involving such events as brakes failing on his automobile or being attacked in his bed. The evidence likewise does not show that the veteran has flashbacks where he has the feeling that the traumatic events are actually occurring. Moreover, the 1986 Veterans Administration psychiatric report shows that the veteran does not experience exaggerated startle response or that he has a diminished interest in activities that he used to enjoy. The examiner at the 1986 Veterans Administration examination concluded that the veteran's history and symptomatology were more compatible with a major affective disorder, than with a post-traumatic stress disorder. This conclusion is to a large extent consistent with the October 1983 Veterans Administration psychiatric examination report wherein a diagnosis of dysthymic disorder was recorded.

The Board recognizes that the October 1985 Veterans Administration psychiatric report records a diagnosis of post-traumatic stress disorder. This diagnosis, however, is not supported by the evidence of record, for the reasons previously noted. Under the circumstances, entitlement to service connection for a post-traumatic stress disorder is not established.

The evidence likewise does not establish entitlement to service connection for any psychiatric disorder. Service medical records show no complaints, treatment, or findings referable to any psychiatric disorder. Moreover, there is no evidence of a psychosis until many years after service.

We have considered the principle of reasonable doubt but find that the facts of this record raise no such doubt.

FINDINGS OF-FACT

1. The veteran does not have a post-traumatic stress disorder.

2. An acquired psychiatric disorder was not present in service.

3. There is no evidence of a psychosis until many years after service.

CONCLUSION OF LAW

An acquired psychiatric disorder, including a post-traumatic stress disorder, was neither incurred in or aggravated by service nor may a psychosis be presumed to have been so incurred. (38 U.S.C. 301, 310, 312, 313; 38 C.F.R. 3.102, 3.307, 3.309)

DECISION

Entitlement to service connection for an acquired psychiatric disorder, including a post-traumatic stress disorder is not established. The appeal is denied.

F. Y. Donn, M.D.

J. M. JOHNSON

F. Y. DONN, M.D.

F. F. Talbot

FRANCIS F. TALBOT

Statement of

EUGENE R. FIDELL

Partner
Klores, Feldesman & Tucker
Washington, D.C.

on

VETERANS' ADMINISTRATION ADJUDICATION PROCEDURE
AND JUDICIAL REVIEW ACT

(S. 11)

Before the

COMMITTEE ON VETERANS' AFFAIRS

UNITED STATES SENATE

April 21, 1988

Mr. Chairman and Members of the Committee:

It is a pleasure to appear today before this Committee in connection with S. 11. I will be brief.

The time is past due to lift the $10 limit on legal fees for VA cases and permit judicial review of VA determinations.

In my law practice I frequently represent active duty and other military personnel in disputes with the government. In the nearly 20 years since I was admitted to the bar, I have also practiced administrative law before a broad range of federal agencies.

To my mind, it is a tragedy that so much controversy has been generated by the proposal to drop the fee limit and to permit judicial review. These are not hard issues, and the need for congressional action is clear. By reporting out S. 11, this Committee can perform a real public service--particularly if, as appears to be the case--the VA will shortly become a Cabinet-level agency.

We suffer from an embarrassment of riches in the representation of veterans and their families. We have a number of excellent veterans organizations, all of which are unquestionably dedicated to the advancement of veterans' interests. They have done yeoman service over the years in representing veterans not only before the VA, but also before the Boards for Correction of Military Records. They deserve everyone's thanks. They rarely get them.

But the fact that nonlawyer assistance is available free of charge from the service organizations is not a reason to preclude veterans from doing what everyone else in our society does--if they so choose, and can pay the freight--i.e., hire an attorney and seek judicial review of agency action. If those receiving social security or similar benefits can hire an attorney if they want, why not allow veterans--people who have sacrificed for their benefits--the same privilege?

It is particularly difficult to see why VA decisions should not be reviewable when those of the correction boards are. I gather it has been suggested that the correction board process has been hampered by the availability of judicial review. I have practiced before each of the correction boards over the last 15 years, handling score upon score of cases, and I have seen no evidence to support that view. Indeed, my conviction is that the presence of lawyers for applicants and the potential availability of judicial review have had a salutary effect on the military record correction process. Indeed, my distinct impression is that the correction boards appreciate it when counsel enter an appearance, because the papers submitted tend to be crisper and get more quickly to the point, making it that much easier for the boards to do their job of ferreting out errors and injustices. I suppose we give them hell from time to time for one thing or another, but no correction board has ever given me the impression that I was an unwelcome guest at the banquet. And I have never heard it suggested by anyone that Congress should prohibit judicial review of BCMR decisions or impose a fee limit.

There is no reason to fear that lawyers and judicial review will destroy the VA system. For one thing, the VA itself has a full complement of attorneys to ensure that its interests are properly represented. For another, it is quite improbable that many veterans will hire an attorney. This is true for at least three reasons: many veterans lack the funds to hire an attorney, few attorneys have even the slightest familiarity with VA procedures, and the very fact that free advice will still be available from the service organizations means many veterans will continue to use those services.

The mere fact that lawyers will be more involved in the process, or that judicial review will be a possibility, does not mean the process will be gummed up with Dickensian legal technicalities. Many agencies with heavy caseloads and longstanding judicial review provisions have found ways to streamline decisionmaking and retain a measure of informality. I am confident the VA will be able to do so even after lawyers become more involved and judicial review is permitted.

In the 19th century, the noted visiting Frenchman, Alexis de Tocqueville, perceptively commented that in America nearly all disputes turn into legal disputes. We may not like this part of our national tradition, and I would be the first to agree that we are overlawyered in some areas. On the other hand, it seems to me, at least, to be indefensible to draw the line at the veterans' doorstep.

I have examined S. 11, and can offer a few specific comments. First, while I recognize that it is a product of the give-and-take which is so essential a part of the legislative process, the bill makes the arrangements for judicial review and attorney compensation more complicated than I would have thought necessary. If the fee limit is to be abolished, let it be done cleanly, instead of retaining it for the potentially critical early stages of the agency process.

Second, I know of no other judicial review framework that so plainly contemplates allowing the agency a second bite at the apple. Is there reason to assume the agency will not really focus on a case until forced to by the filing of a lawsuit? I hope not.

Third, the Committee may want to make sure that the district courts are the best forum for judicial review. While they are, of course, more convenient than the courts of appeals, if review is basically going to be confined to the record developed before the VA, then the reviewing court is performing an essentially appellate function. To this extent the Committee might be tempted to conclude that optimal use of scarce judicial resources calls for review in an appellate, rather than a trial, court. In its 1975 recommendation on "The Choice of Forum for Judicial Review of Administrative Action," 1 C.F.R. § 305.75-3 (1988), however, the Administrative Conference of the United States noted the availability of district court review of social security claims cases, and suggested that the number of cases was one of the factors to weigh in deciding where judicial review should lie. How this issue is best resolved is not an easy question, and I would encourage the Committee to obtain the views of the Judicial Conference of the United States and/or the Federal Judicial Center, as well as the Administrative Conference, if it has not already done so, before becoming wedded to one judicial review forum over another.

Let me close by stressing that dropping the fee limit and allowing judicial review must not be taken as a vote of no confidence in either the service organizations or the VA. I certainly do not view them that way, and I do not feel this Committee must find that the agency is an arsenal of injustice in order to remedy these shortcomings. The question is whether the availability of counsel to those who choose to use counsel is at war with the advancement of veterans' interests, or rather, whether allowing counsel where the veteran can find one who will do the job can be a useful addition to the administrative framework.

I am proud to be an attorney. I think our profession--including the thousands of lawyers who are themselves veterans--has served the country well, and I cannot imagine why public policy would shrink from allowing veterans the professional legal assistance they sometimes need to protect the rights Congress has given them, just as GM or IBM do when the need arises. And nobody puts up a fuss when GM or IBM say they need provision for judicial review when they are subject to one regulatory program or another.

Thank you for considering these views.

Statement Of Keith A. Rosenberg, Esquire
Of The Law Firm Of Whiteford, Taylor & Preston
Before The Senate Veterans Affairs Committee[1]

Thank you for the opportunity to appear before you today to express my continued concerns about judicial review of benefit determinations of the Board of Veterans Appeals ("BVA") and payment of attorneys fees for certain types of representation of Veteran's claims.

In making my comments on S.11 and S.2292 I draw upon almost 15 years of legal experience in the area of military law, as a law clerk in the former United States Court of Claims, author of law review articles on judicial review of military pay cases, and an attorney in private practice where much of my time has been devoted to representing service members and veterans before the various boards for correction of military records, the courts and the Veterans Administration. In cases before the VA my firm has offered its services on a pro bono basis.

In expressing my views on S.11 and S.2292 I carefully reviewed the bills as well as previous legislative attempts to achieve similar results. I also reviewed my previous comments regarding H.R.585 before the Committee on Veteran's Affairs, House of Representatives, 99th Congress, Second Session on H.R. 585. My views on judicial review of veterans' benefit determinations as expressed before the House when it considered

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[1] The views expressed in this statement are those of Mr. Rosenberg and do not necessarily reflect the views of Whiteford, Taylor & Preston.

H.R. 585 in 1986 have not significantly changed. Moreover, my predictions about the administrative resolution of claims before the correction boards, unfortunately, have come true.

Analysis of S.11

Although I continue to remain opposed to judicial review of benefit determination cases and the payment of attorneys fees as proposed in S.11 for reasons that I will further explain, S.11, in particular, has two points which deserve your favorable consideration. First, the bill codifies the regulatory standard that the V.A. applies that the benefit of the doubt is to be resolved in favor of the veteran. Second, S.11 would provide that certain rule-making functions of the VA would be governed by the provisions of the Administrative Procedure Act.

Judicial review of benefit determinations as proposed by S.11 injects the federal judiciary into an area that it is ill-equipped to handle. First, if enacted into law, S.11 would add thousands of cases to an already over burdened federal judiciary and result in district judges resolving issues that they are ill-suited to consider and for which they have no experience. Second, the standard or scope of review proposed in Section 4026(a)(1)(D) ("utterly lacking in a rational basis in the evidence ...") is unmanageable and lacking in judicial predicate. It appears to be a standard somewhere between "clearly erroneous" and "beyond a reasonable doubt" in the spectra of burdens of proof. Under such a rigid standard one is compelled to ponder how many claimants could satisfy such a burden. Third, judicial review by the district courts and resulting appeals is likely to breed conflicts in the circuits, conflicts which the Supreme Court is likely to decline to resolve. Finally, the proposed legislation appears to permit judicial review of the rating schedule (VASRD) and its application which invites unwarranted litigation not only on the issue of whether a claimant is entitled to any relief, but also whether the schedule was properly applied and the claimant received the proper rating.

Again, I must reiterate that judicial review of benefit determinations is destined to produce a body of case law that need not be favorable to the veterans. The services of the U.S. Attorneys will be enlisted to represent the VA in court. As adversaries they will muster their creativity to fashion legal arguments to bar relief just as they have done in military pay cases. There is absolutely no reason to conclude that these legal principles will not trickle down to the BVA to be used as a basis to deny relief at the administrative level. To my colleagues who doubted that result in connection with the corrections boards, I commend them to review recent decision of the Army Board for Correction of Military Records strictly construing its statute of limitations and imposing laches to bar recovery in substantially mentorious cases.

My comments should not be interpreted as opposing all judicial review of Veterans Administration matters. Each year the VA promulgates rules and regulations that impact of the benefits that veterans may receive and their rights to appeal certain determinations within the VA system. Issues such as these that raise questions about the constitutionality of actions of VA, the validity of its regulations and the effect of regulations on rights and benefits provided by law are worthy issues for judicial review. Congress should enact legislation in a form similar to S.2292 that resolves, once and for all, the right of veterans to bring such claims to the federal courts for resolution.

Although I remain opposed to the payment of attorneys fees for rendering services in benefit determination cases, S.11 is an improvement over previous legislative efforts in this regard. S.11 acknowledges that attorneys fees may fluctuate according to the complexity of the case. However, S.11 has some problems with regard to attorneys fees. Attorneys would continue to be precluded from charging a fee in excess of $10.00 for handling an initial claim before the VA. This is a positive approach since it reduces the likelihood that the BVA would become an adversarial forum. However, I do not read S.11 as precluding attorneys fees for representation on remand from the courts or where a claimant is presenting new, additional or material evidence. This creates somewhat of an anomaly the impact of which is hard to predict. Will the VA system become adversarial under S.11 because attorneys will invade the system on remand and reconsideration?

Finally, I continue to ponder whether S.11 truly responds to a known, quantifiable problem or is it an overwhelming response to a vocal minority? Statistically, lawyers fare no better before the BVA than service organizations. Moreover, the rate of favorable consideration by the BVA has remained basically constant over the years. The majority of claims for benefits are denied by the BVA. We have no guarantee that only mentorious claims will be filed with the courts. Experience with and in our litigious society suggests otherwise.

Analysis of S.2292

S.2292 preserves the finality of benefit determinations, but provides a framework for judicial review of the validity of regulations and rules both under the Administrative Procedure Act as well as at VA. Veterans will be provided a reasonable avenue for judicial review that does not overwhelm the federal judiciary with cases it is not equipped to resolve.

This legislation should not be viewed as an open invitation to challenge every denial of a benefit determination on the basis of its illegality. My reading of S.2292 leads me to conclude that the issues to be resolved by the judiciary are those relating to the "validity of the regulations" not their Proposed Section 4010 clearly defines the scope of review in traditional terms preserving the sanctity of the factual determinations, VASRD, and the application of the facts to the law "unless they raise a constitutional issue".

Further, this legislation limits the attorneys' participation for a fee before the BVA in traditional benefit determinations while permitting them to charge a fee both before the BVA and in the courts where the validity of a regulation is raised. Unlike previous proposals, S.2292 invites attorneys to take on the difficult cases because it allows flexibility to the fees that can be charged. This clearly encourages lawyers to assist veterans for a reasonable fee.

S.2292 goes a long way to correct what has been perceived by some to be "problems" with the VA adjudication's failure system to allow for judicial review. It compromises the need for judicial
review with the perils of turning the VA into an adversarial system. It allows for the payment of reasonable attorneys fees for those who the press a challenge to the validity of regulations. S.2292 provides a meaningful check and balance to perceived abuses in the VA adjudication process. I recommend your favorable consideration of S.2292.

Statement of Senator John Kerry
Committee on Veterans Affairs
U.S. Senate
April 28, 1988

Mr. Chairman, Thank you very much for giving me this opportunity to appear before this Committee to testify on the subject of judicial review for veterans. I am grateful to you for your leadership on this issue of concern to veterans. I have joined with you in cosponsoring S. 11 to give veterans the right of judicial review which all other American citizens enjoy. I strongly support this legislation, and I hope that it will be reported out favorably by this Committee.

Mr. Chairman, one of the most fundamental principles of American democracy is the right of all citizens to have equal access to our judicial system. The greatness of our system of government lies in the fact that all citizens are equal under law - that no citizen, no matter how powerful, is above the law, and no citizen, no matter what his station in life, is denied the equal protection of the law. The guarantee of access to our judicial system, and the protection of our legal rights provided by the Constitution, is what makes our system of government unique, and differentiates us from totalitarian societies.

Unfortunately, there is still one group of Americans for whom the guarantee of access to our legal system does not apply. I am referring to our Nation's veterans.

Veterans, unlike all other Americans, are denied by law the fundamental right of access to the American judicial system. Illegal aliens, prisoners, the mentally ill and disabled, and Social Security pensioners all enjoy the right to appeal to the Federal courts. Veterans do not.

The fact that veterans are denied this basic right is an archaic, anachronistic result left over from a paternalistic era in American history. These limitations, along with a limit of $10 on attorneys' fees in veterans' cases, were imposed during the Civil War era, for the purpose of "protecting" veterans from legal exploitation. Such "protections" are no longer needed, or indeed desired, by the vast majority of veterans today.

A poll just completed by the Cambridge Survey Research organization shows that veterans throughout the United States support the right of judicial review by a 3 to 1 margin. They believe that the present system should be changed. This is true across all major demographic and attitudinal groups, and among veterans of all age groups. To contend that veterans do not want or support judicial review is simply a myth.

Mr. Chairman, I would like to describe the case histories of two veterans from Massachusetts, to illustrate the unfairness of the current system of judicial review for veterans.

Walter Norton is a 40 year old Vietnam veteran living in Boston, and a personal friend. He is a Marine Corps veteran and served in Vietnam. He served in combat. His experiences in Vietnam, in the words of his psychiatrist at the VA Outpatient Clinic in Boston, included "at least witnessing many atrocities, bagging the bodies of dead buddies", and living through the kinds of experiences most commonly associated with PTSD", or Post Traumatic Stress Disorder.

Mr. Norton has applied for 100% disability from the Veterans Administration due to his inability to work caused by the PTSD condition. He has been treated by several psychiatrists in Massachusetts, all of whom have found him to be disabled and unemployable. Nevertheless, his claim has been repeatedly denied by the Veterans Administration.

A psychiatrist who examined Mr. Norton for the VA, Edmund Kudaraskas, M.D., wrote in his file: "Dr. Johnson detailed his work with Mr. Norton and told of Mr. Norton's unsuccessful attempts to return to school at the University of Massachusetts in Boston. He seemed highly motivated at the time, but realized that it would be difficult to go back. He discussed at length with Dr. Johnson his curriculum and his hopes for the future, tried to attend a few classes at first. However, he developed agoraphobia and claustrophobia which put him into panic states, either before leaving school or on the way, but especially in the subway, with the crowds of people who were there at the times that his classes were to be. in order to help the veteran attend school, Dr. Johnson increased his medication of Alprazolam for his severe anxiety and his sleeplessness and Flexoril for the grinding of his teeth, his bruxism. However, the amount of medication necessary to control his panic states and his phobias so drugged him that he was unable to function in school and at that point had to withdraw."

Mr. Norton then went to another psychiatrist who specialized in Post Traumatic Stress Disorder, Dr. Richard Owings. The file indicates that "He was working Mr. Norton in an attempt to work through his survival guilt, sense of victimization, terrifying reminiscences, etc., and how his post-traumatic stress disorder status functions with his underlying character to solve life problems in a less than satisfying way.

Dr. Owings wrote to the VA: "I have reviewed his record and have seen Dr. Kuderoskis' and Dr. Johnson's letters in support of the claim. I concur with their assessment of his symptoms, the suffering they have caused him, and his unemployability."

Dr. Kudarauskas wrote that "Mr. Norton is an extremely desperate man. He sees his current therapy and his attempt to reconstruct himself with the help of professionals as his last chance... He is unable to work because of the extreme anger that he has to deal with, the alienation, the stressful preoccupation with his sympomatology and the all-consuming nature of the treatment... The patient is anxious, tense, brooding, preoccupied with the same flashbacks and nightmares that he had been experiencing at his prior examination. He shows, in addition, phobias, panic states and extreme depression. He is isolated, alienated, withdrawn, with emotional blunting. His judgment is compromised by the intensity of his symptomatology. His inability to concentrate and his distractability has been a problem in his studies. That and his explosive anger has prevented him from working and causes him to withdraw further. His immediate prognosis is poor. His long-term prognosis is guarded but hopeful."

Mr. Norton's psychiatrist at the VA Outpatient Clinic in Boston, Dr. Charles Johnson, the Assistant Chief of the Psychiatry Service, wrote to the VA: "In my carefully considered opinion, this man is dealing with psychological emotional scars incurred during his service in Vietnam. I cannot understand why he is now denied a service-connected disability for this condition. There is something seriously wrong with a country which treats its combat veterans this way."

Mr. Chairman, I can only concur with Dr. Johnson's statement. There is something seriously wrong with a country which treats its combat veterans this way.

I would like to describe the case of one other veteran from Massachusetts to illustrate the problem we are confronting here. Francis D. Scordino is a veteran of World War II from East Dedham, Massachusetts. He served on active duty from January 1944 to December 1945. He was a prisoner of war from January 9 to May 10, 1945.

Since 1945, Mr. Scordino has suffered from sleep problems, skin disorders, angioneurotic edema, arthritis, tendonitis, frozen feet, allergy hives, and dysentery.

Mr. Scordino worked for 19 years as an auditor with the Massachusetts Department of Revenue, from May 1966 to November 1985. In March of 1985, he became too disabled to work full-time. He was forced to retire from his job five years prematurely because of his mental and physical problems.

After his retirement, Mr. Scardino tried to work part-time as a National Service Officer for a prisoner of war organization, but he had to resign because of his service-connected mental and physical disabilities.

In describing the circumstances leading to his disability retirement, Mr. Scardion describes symptoms including inability to concentrate, mental lapses, angioneurotic edema which became life threatening on occasion, and family and social withdrawal.

In October 1985, the Massachusetts Board of Retirement found Mr. Scordino to be permanently and totally disabled due to idiopathic angioneurotic edema, urticaria, anxiety reaction, and degenerative arthritis of the right knee.

In an October 1985 letter, a Veterans Administration staff physician reported that he had examined the veteran and found him to be completely and permanently disabled due to the conditions listed above.

In February 1986, Mr. Scardino was examined by a board of three physicians for the purpose of state disability retirement. The panel found that this veteran was "no longer capable of performing his duties because of his disabilities." They recommended permanent retirement by reason of ordinary disability.

Mr. Scardino applied to the Board of Veterans Appeals for entitlement to an increased disability rating for generalized anxiety disorder with dysthermic disorder and psychological factors affecting angioneurotic edema, evaluated as 70% disabling. He also applied for entitlement tot a total rating based on individual unemployability due to service-connected disabilities. Mr. Scardino was represented in his appeal by the Disabled American Veterans.

On April 7, 1988, the Board of Veterans Appeals rejected Mr. Scardino's appeal and denied his claim. They denied both his appeal for an increased rating and for a total rating, stating that "individual unemployability due to service-connected disability is not established. The appeal is denied."

So this World War II veteran, a former prisoner of war -- a man who worked for the state of Massachusetts for 19 years until he could no longer work, who then tried to work as a service officer for a group to help other POW's but could not continue -- was denied disability benefits by the Board of Veterans Appeals.

And yet, Mr. Scardino, like Mr. Norton, has no legal right to go to Federal court to appeal his case. This is a fundamental injustice. This is why we need to have the right of real judicial review for veterans.

Mr. Chairman, the United States Senate has five times voted unanimously in favor of judicial review for veterans. In the last Congress, the Senate again passed legislation, which I co-sponsored, to provide judicial review for veterans. But the House of Representatives has consistently failed to act.

The bill was also opposed by the Veterans Administration. It is ironic that this Administration, which claims to honor our military men and women, in fact has waged an all-out effort to deny basic legal rights to America's veterans. Unfortunately, they have been all too successful. Under the Carter Administration, the VA came out in favor of judicial review for veterans. But under the Reagan Administration, the VA has changed its tune.

It is indeed ironic that, in the past year, the Veterans Administration sued over 40,000 veterans in federal court to recover money which it claimed that the veterans owed to the VA. But when a veteran believes that he or she is owed money because the VA has made an error in denying a claim for benefits, the current law prohibits the veteran from filing a lawsuit. In other words, justice is a one-way street for veterans. There is one set of rules for the VA, and another for America's veterans. This unfair system must be changed.

The Senate will shortly be considering legislation to elevate the Veterans Administration to Cabinet level status. This is a symbolic step which implies greater recognition of veterans, and as such I support it. But far more important than symbolism is substance. And giving veterans a seat at the Cabinet table is an empty gesture if veterans do not also have the ability to go into federal court to enforce their rights.

I would like to briefly address some of the principal criticisms that have been made on the subject of judicial review. First, it is suggested by some critics that the current system works well, so why fix it if it is not broken?

Cases like those I have just cited indicate that the system does not work well. If additional evidence is needed, the evidence was provided in the NARS case -- a lawsuit by the National Association of Radiation Survivors against the VA. In that suit, a Federal judge last year fined the VA over $100,000 dollars due to its destruction of documents and efforts to obstruct justice. The NARS case exposed the fact that the VA does not treat many veterans fairly, and that they system is seriously flawed.

Second, it is argued that with judicial review, attorneys would get rich at the veteran's expense. The truth is that S. 11 carefully limits the amounts that attorneys would be allowed to receive. Veterans, rather than their attorneys, would be the winners with judicial review.

Third, it is argued that judicial review would cost too much. This would only be true if it were also true that the VA were shortchanging many veterans by denying them benefits. To say that judicial review would cost too much money is to admit that the VA is making many mistakes in adjudicating veterans claims. This is exactly why judicial review is needed. According to CBO estimates, the first year cost of S. 11 would be $2 million, and in the first five years the cost would be $16 million. I would argue that the human costs of denying veterans justice is much higher.

Finally, it is argued that giving veterans the right of judicial review will create an adversary relationship between veterans and the VA. This is not supported by experience. The Board for Correction of Military Records decisions have been subject to judicial review for decades, yet their proceeding have remained non-adversarial in nature. Court review has not impeded representation by veterans service representatives, nor has it changed the nature of the BCMR decision-making process.

S. 11 also makes statutory the requirement that the VA keep its non-adversarial system. It requires the VA to give the veteran the benefit of reasonable doubt, which is not a statutory requirement at present. If anything, it would be more likely that the Board of Veterans Appeals would give the veteran's claim this consideration if they knew that the decision was subject to review by a federal court.

I would also like to say a word about S. 2292, the legislation sponsored by Senator Murkowski on this subject. While I believe that this legislation has some useful features, I am concerned by certain aspects of S. 2292. Specifically, I believe that it does not go far enough in terms of allowing veterans access to the courts for a factual review of their claims. S. 2292 would only allow a veteran to challenge a VA regulation -- not to contest the facts of his or her individual claim. Without that ability, veterans still would not have the right of true judicial review.

I believe that S. 11 is a superior piece of legislation precisely because it does give veterans the right to contest an adverse determination of their individual claims, by allowing them to appeal to a federal District Court. This bill would allow the court to review the record, and determine whether there was a rational basis for the VA's decision in his or her case, and whether a manifest injustice had been done. The court would then have the ability to remand the case back to the Board of Veterans Appeals for further review. If the decision by the BVA was still adverse, the court could still review it and reverse the decision if appropriate.

None of these procedural safeguards exist in S. 2292. While veterans should have the right to challenge VA regulations, they should also have the right to go to court to appeal the decisions and factual determinations in their specific cases. This is the essence of what the right of judicial review entails.

Mr. Chairman, for those of us who are veterans, the denial of basic legal rights to all veterans is a continuing injustice. There is a wall in Washington, at the Vietnam Memorial, which contains the names of 58,000 Americans who made the ultimate sacrifice for this country, so that all of us could live in liberty. Surely those fundamental liberties should not be denied to those who have fought to protect them. Veterans are entitled to the same legal rights as all other Americans. The time to provide those rights is now.

Statement of

The American Legion

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by

E. PHILIP RIGGIN, DIRECTOR
NATIONAL LEGISLATIVE COMMISSION
THE AMERICAN LEGION

before the

COMMITTEE ON VETERANS AFFAIRS
UNITED STATES SENATE

on

S. 11 AND S. 2292 REGARDING
JUDICIAL REVIEW OF VA CLAIMS DECISIONS

April 28, 1988

STATEMENT OF E. PHILIP RIGGIN, DIRECTOR
NATIONAL LEGISLATIVE COMMISSION
THE AMERICAN LEGION
BEFORE THE COMMITTEE ON VETERANS AFFAIRS
UNITED STATES SENATE
APRIL 28, 1988

Mr. Chairman and Members of the Committee:

Before speaking to the other provisions of the legislation under consideration today, it should be noted that The American Legion has for the last ten years voiced its recognition that a reasonable and responsible increase is warranted in the fee which VA claimants may be charged by private attorneys for representation in claims before the Veterans Administration. This organization considers the current $10 limitation on attorney fees, under section 3404 of title 38, United States Code, to be antiquated and outdated. In considering the proposals to remove this restriction and increase the limit on such fees, we do however want to ensure that VA claimants, who are disabled and very often have limited financial resources, are not forced to pay out a major portion of the benefits to which they are justly entitled for the services of an attorney.

Mr. Chairman, we do not want veterans to face what has happened in the case of certain Social Security beneficiaries. We call to the Committee's attention the findings of the 1987 audit report by the Inspector General of the Department of Health and Human Services on the attorney fee process in Social Security disability cases. Highlighted was the fact that in an estimated forty-five percent of appeal cases decided by Social Security Administrative Law Judges, the attorney fees were in excess of what the agency deemed reasonable. Of the $100 million in attorney fees charged successful Social Security claimants in 1984, about $23.6 million involved charges that were subsequently determined to be in excess of the hourly rate standard in use at that time. The conclusion of the report is that Social Security claimants were being overcharged and the fee authorization workload was detracting from the primary mission of the

Administrative Law Judges to hear and decide the merits of claims for Social Security Old Age and Disability benefits.

Mr. Chairman, we shall now address the legislation that is under consideration this morning. There are several provisions contained in Title I of S. 11 which The American Legion is prepared to support as these would improve certain administrative and adjudicative procedures of the VA. There are several others upon which we shall offer comment.

Chapter 51 of title 38, United States Code, would be amended by adding new section 3007 specifying by statute that a claimant for VA benefits shall have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded. It further requires the VA to assist a claimant in developing the facts pertinent to the claim. This creates a problem in our mind. The VA has historically been charged with the burden of the development of claims. However, The American Legion has challenged the VA on occasion, as the agency has not always developed claims to the extent that we felt was reasonable and appropriate. To impose additional burdens on the claimant when the VA has not met its duty to develop claims is unwarranted.

The term reasonable doubt is also defined in this section as the approximate balance of positive and negative evidence in a VA claim with the benefit of the doubt going to the claimant. Similar provisions have been previously codified into current VA regulations for the purpose of constraining the VA's adjudication process. The doctrine of reasonable doubt should function as an integral and fundamental principle of VA rating policy and practice. It appears this proposed redefinition represents a further effort to clarify and more precisely define the manner in which benefit claims are to be resolved, particularly when the evidence both for and against a claim is in the balance.

It is noted that title 38, Code of Federal Regulations, currently contains a lengthy description and discussion of the circumstances to which the doctrine of reasonable doubt is to be applied. This regulatory provision was initially incorporated into the statement of general rating policy contained in the 1933 Schedule for Rating Disabilities. Over the years several revisions have been made to the language of this provision in an effort to ensure that it was being consistently and equitably applied in the process of adjudicating veterans' benefit claims. The most recent revision to this regulation, 38 USC 3.102, was accomplished in 1959. In our view, the redrafting of this regulatory provision into the statute does not add particular clarity or status to the terms "burden of proof" or "reasonable doubt", nor does it effectively address the problem of misunderstanding and confusion frequently existing among VA adjudicators and claimants as to what constitutes reasonable doubt and when this provision should be applied in a final determination in a benefit claim. However, the enactment of statutory constraint may be beneficial to VA claimants, in this instance in contrast to the current situation where statutory language does not exist. In this matter, we are prepared to defer to the Committee's judgment.

The American Legion favors the proposals set forth by sections 103, 104, 105, and 107 to improve the adjudicative and appellate process. Section 103 requires the Chairman of the Board of Veterans Appeals to submit an annual report to the Congress detailing the operations and experience of the Board of Appeals to include an evaluation of the Board's ability to ensure the timely disposition of appeals based upon existing and projected personnel and caseload levels. Section 104 provides for due process notification to an appellant concerning consideration of newly developed additional evidence in a claim. It also provides for the notification of the right to a personal hearing on such additional evidence. In appeals, a member of the Board whose appointment is of a temporary nature would be prohibited from participating in a final vote as to the disposition of the appeal. Section 105 provides for a personal hearing in the course of the review of the claim and sets forth the circumstances under which a finally disallowed claim may be reopened. Section 107 requires the Board of Appeals to obtain an advisory medical opinion in resolving a substantial difference of medical opinion in a claim when requested by the claimant. If the request for such action is denied, the Board of Veterans Appeals shall prepare and provide the claimant a statement setting forth the basis for its determination. Actions by the Board of Appeals, including any such denial, shall be final and conclusive and shall not be reviewable by any official or court of law.

New section 4010 would be included in Chapter 71 of title 38 providing statutory procedures to be followed by the VA in conducting any hearing, investigation, and any other proceeding in conjunction with the consideration of a claim for VA benefits. It specifies, in addition to the provision for the administration of oaths and affirmations, and examination of witnesses, that any oral, documentary, or other evidence may be admitted in a hearing even though inadmissable under the rules of evidence applicable to judicial proceedings. At such hearings, any party to the proceeding or such party's authorized representative shall have the opportunity to: have a reasonable time to review the record; present witnesses and evidence; make oral or written contentions; and submit rebuttal evidence. The American Legion is supportive of these proposed provisions as they would confirm and enhance current procedures set forth in VA regulations.

The American Legion, however, would be opposed to that provision of section 4010 authorizing the serving of interrogatories on any individual, including VA employees. Such interrogatories are to be answered fully and in writing within 30 days, or the individual may be subpoenaed to testify before the VA relative to such interrogatory. The introduction of interrogatories enforceable by subpoena into the normal informal adjudicative process of the VA would, in our opinion, add an extra burden, the effect and benefit of which is not entirely clear.

New section 4011 would be added to Chapter 71 setting forth provisions for notice to the claimant of certain procedural rights at each procedural stage of a claim. These would afford the individual much more information concerning his or her rights and possible courses of action. One of the main complaints set forth by claimants is that either they did not know what action to take with their claim, or they could not understand the VA's notices and instructions. The end result has been that many have not followed through on appeals which may have ultimately resulted in the provision of benefits. The American Legion strongly endorses this measure. The VA has a primary obligation and responsibility to all claimants to ensure they are fully informed of their rights under the law.

S. 11 proposes a two year study to evaluate the feasibility and desirability of alternate methods of resolving benefit claims in a more prompt and efficient manner, to include the opportunity for claimants to appear at a personal hearing at a location convenient to their place of residence. For the purposes of conducting such hearings, not more than three geographic areas are to be selected. Such hearings will be de novo before a three member panel of VA employees who have not previously considered their claim. They will have the authority to change the previous decision or confirm the denial and will issue a new statement of the case. In addition, the study will require an increased schedule of visits by the traveling panel(s) of the Board of Veterans Appeals. Not later than six months after the completion of the study, the Administrator is to report to Congress on the results, including an evaluation of the cost associated with the various alternatives, the impact on the workload at each regional office involved in the study and the impact upon the annual caseload at the Board of Appeals. The report would also include any administrative or legislative recommendations.

This particular study may appear to be unnecessary in view of current actions underway by the VA implementing the consent decree in the Semenchuk v. Turnage case whereby the VA will be establishing some thirty Hearing Officers to provide an intermediate level of adjudication in the appeals process and to afford claimants the opportunity for a personal hearing at the regional office of jurisdiction. The American Legion has commended the VA for the scope of this initiative. However, we strongly believe that Congress should provide the VA additional staffing support to ensure the full implementation of this Hearing Officer program. Because such Hearing Officers will be drawn from the ranks of Adjudication Division personnel in the regional offices, the loss of such highly qualified staff could have an adverse effect on a station's workload unless Congress also includes provision for replacement personnel.

Mr. Chairman, both S. 11 and S. 2292 include proposals that would require the VA to adhere by statute to the rulemaking procedures prescribed by title 5, United States Code, to include publication of any proposed rule in the Federal Register for public comment. It would confirm what is current VA policy and procedures. In addition to the requirement for the publication of any new regulation or change to an existing regulation, this provision clearly specifies that once promulgated in accordance with section 553 of title 5, United States Code, VA regulations would be subject to judicial review with the exception of the VA Disability Rating Schedule. The American Legion has stated its support for current legal practice which has held that VA regulations and procedures are indeed subject to court review.

The American Legion is supportive of this proposal as it establishes by specific statute both a formal procedure by which a VA claimant can raise a substantial challenge to the legality of agency policies and actions and a forum in which the merits of any such challenge can be tested.

The recognition of the special contributions of veterans - and their unique rights and privileges - could be no more eloquently stated than was done by Supreme Court Justice William H. Rehnquist in a landmark decision of the high court affirming the unfettered right of veterans to petition the government. He stated in the May 23, 1983 decision:

> "Veterans have been obligated to drop their own affairs and take up the burdens of the nation, subjecting themselves to the mental and physical hazards as well as the economic and family detriments which are peculiar to military service and which do not exist in normal civil life. Our country has a long-standing policy of compensating veterans for their past contributions by providing them with numerous advantages. This policy has always been deemed to be legitimate."

In this context, it should be noted that every veteran in his or her status as a citizen has the right to seek relief in the courts of the United States with respect to all matters involving an issue of their constitutional rights. Such judicial review encompasses the procedures and policies of the Veterans Administration. However, such legal challenges have been difficult and are generally beyond the means of the average veteran and family. The American Legion believes this proposal of S. 2292 will ultimately prove to be beneficial to both individual claimants and the VA itself. By permitting the Board of Veterans Appeals broader authority in its review of claims, many of the problems and inequities in the current adjudicative system may be addressed in a meaningful manner and corrective action may be instituted. Not only will this serve as a means to restore public confidence in the integrity and independence of the Board of Veterans Appeals, but it will help ensure that benefits are received where due under the law.

Mr. Chairman, with respect to the provision of S. 11 and S. 2292 authorizing judicial review, each measure poses a different means by which veterans may challenge certain decisions of the VA in their claims for benefits and we will address each proposal separately.

S. 2292 proposes the retention of section 211(a) of title 38, United States Code, barring judicial review of decisions by the VA unless such decisions raise a constitutional issue. However, this measure would expand the authority of the Board of Veterans Appeals so as to permit the adjudication and resolution of challenges to the validity of VA regulations in the course of an appeal. It would further permit a decision of the Board of Veterans Appeals on a question of the validity of VA regulations to be subject to court review.

New section 4010 would be added to title 38, United States Code, authorizing limited judicial review of determinations of the Board of Veterans Appeals on issues involving a challenge to the validity of VA regulations. It is significant that the Board's authority to adjudicate and resolve such challenges extends not only to VA regulations promulgated under title 5, United States Code, but will also include those statements of general policy and interpretations of general applicability which have been adopted by the Administrator. Following a determination by the Board of Appeals on such challenge a claimant shall be able to initiate a petition for review by the United States Court of Appeals. This measure would further assure and enhance the independence of the Board of Appeals in its review of VA regulatory procedures, since such determination would not be subject to review by any other official of the agency. Provision is included for the Administrator to petition the United States Court of Appeals for a review of the Board's determination as to the invalidity of a VA regulation. The decisions of the Board of Veterans Appeals with respect to all other issues involved in an appeal shall be final and conclusive, and not subject to court review unless they raise a constitutional issue. The issue of the validity of the regulations for the Schedule for Rating Disabilities will not be subject to judicial review.

In keeping with this proposal, we wish to discuss an additional problem which adversely affects the ability of veterans to have their claims fully and fairly adjudicated. Under current regulations, the authority of the Board of Veterans Appeals to review a veteran's claim is limited to consideration of the issue(s) on appeal as certified by the regional office of jurisdiction. There are instances where the claimant has, at some time in the past, raised an issue or issues which were never properly disposed of in accordance with VA law, regulation or policy either in the course of the adjudication of the claim or in the development of the appeal. If noted during the review by the Board, there is no provision in law or regulation whereby the Board may routinely assume jurisdiction of such an issue and dispose of it or advise the regional office of the procedural, administrative, or legal error. Nor may the Board direct the regional office to take the necessary appropriate corrective action. This becomes particularly acute, since there is no authority to even inform the claimant of the existence of any error(s) found in the case so that the individual might pursue corrective action. The American Legion would recommend that the Committee consider the possibility of extending the Board's authority to review and act upon the claimant's entire record together with the proposal allowing the Board to address the validity of agency regulations as a means of assuring the fullest possible consideration of a veteran's claim.

With respect to S. 11, The American Legion is opposed to the proposal to amend section 211(a) of title 38, USC, so as to allow judicial review of VA decisions on claims for veterans benefits.

The American Legion's position on the subject of amendment to section 211(a) of the title as to permit judicial review of decisions of the VA on benefit claims is currently set forth in Resolution 140 adopted by the 1986 National Convention. The adoption of this resolution reflects the culmination of the process of democratic debate within our organization and the opinion of the majority of the delegates to the National Convention.

The proponents of judicial review however have continued to argue that the bar of the access to the courts is an inequity and that veterans are treated as second class citizens. The American Legion has not and does not accept this premise. Veterans have the right to appeal and are provided a forum in which to exercise this right and privilege through the Board of Veterans Appeals. The fact that the law does not provide for the possibility of judicial review does not in and of itself constitute a denial of any fundamental rights. The proponents have likewise sought to portray the Veterans Administration as the sole Federal agency that is exempt from judicial review with the very strong inference that this distinction is somehow a legal aberration which cries out for redress. We must point out the fact that there are more than 70 Federal programs involving claims and benefits, apart from the VA, which by statute and court precedent are not subject to judicial review, according to the Congressional Research Service. We submit that the current law is neither unjust nor unfair.

The proponents of judicial review appear to regard the current system under which veterans' benefit claims are reviewed and adjudicated as so fatally flawed as to require court action to address not only alleged erroneous decisions in individual cases, but to correct the inequities and problems within the agency. The American Legion does not share this bleak appraisal of the current adjudicative process of the Veterans Administration or the simplistic conclusion that judicial review is necessarily the only or the most viable course of action for Congress to pursue in order to address the many recognized problems of the VA. Based upon more than sixty years of assisting VA claimants in the development and presentation of their claims in the regional offices as well as at the Board of Veterans Appeals, this organization continues to believe the VA's system is fundamentally and in the main fair.

The question has been raised, and perhaps rightly so, as to why The American Legion, as the largest organization representing veterans would not support judicial review as a matter of equity.

The American Legion has testified on numerous occasions in support of the retention of section 211(a) of the title on the basis that judicial review would mandate a transformation of the VA's claims process from an informal and nonadversarial administrative system. We firmly believe that if this informality were lost, veterans and others would have a harder time establishing their claims. While the proponents question this conclusion and suggest that the current system is adversarial and rigid, we submit that each case is decided upon the evidence of record.

This is not to say, however, that the VA's adjudication process, including the Board of Veterans Appeals, is perfect. Nor do we subscribe to the adage - "If it ain't broke, don't fix it." In the judgment of The American Legion, the system may not be "broke", but there are very clearly a number of chronic problems directly affecting veterans and the agency's ability to fulfill its mission. This organization has testified at legislative and oversight hearings before Congress on numerous occasions concerning a variety of complex administrative and budgetary problems, their impact, and the need for appropriate and timely action including the elevation of the Administrator to Cabinet status. Many of the most severe and complex problems still exist including persistent staffing cuts imposed on the Department of Veterans Benefits as a result of budget cuts, the need for further improvement in due process procedures, strengthened quality control procedures, more adequate data processing equipment, etc. There are many other similar shortcomings which we could discuss at length, but we do not feel this is the appropriate time to undertake a total examination of the Veterans Administration's budgetary problems.

In this regard, we must conclude that the pressing nature of the problems have sapped much of the vigor and vitality of the agency. They clearly have had a dramatic and very negative effect upon morale throughout the field stations and in the Department of Veterans Benefits as a whole. The loss of over 6,000 workers in this Department over the last ten years has resulted in diminished quality in many of the decisions rendered over this period. Officials of the Veterans Administration have been pressured by Congress and the Administration to provide faster service while at the same time cutting the human and mechanical resources to accomplish this goal. In an effort to comply, the VA has undertaken management initiatives and programs which emphasize quantity, and to a lesser degree quality. The sheer volume of claims actions in a year, some 2.5 million, by the 58 VA regional offices and approximately 42,000 appeal decisions necessitate efficient work procedures. However, veterans are entitled to quality and timeliness in any determination affecting their claims for benefits.

Although judicial review of individual benefit claims has been touted as the medicine for the ills affecting the VA system, The American Legion is particularly concerned by what this proposed legislation will not and cannot do for veterans. The proposal does not address the very problems currently hampering the VA's own and Congress's efforts to correct and improve the adjudication and benefit delivery system. The VA is left limping along under severe budget constraints and personnel ceilings and should judicial review be enacted, additional workloads and budget requirements would ensue. Judicial review, as proposed in S. 11 may move the responsibility for taking any necessary corrections or improvements in the adjudication and appellate process from the VA to the Federal courts.

The system can be made to work better through the cooperation and concern of all those committed to the protection of the rights and interests of veterans. In conclusion, we do not believe an amendment of section 211(a) is an appropriate manner in which to address the needs of veterans and to provide timely and necessary solutions to the agency's problems.

PVA
PARALYZED VETERANS
OF AMERICA
Chartered by the Congress
of the United States

STATEMENT OF

R. JACK POWELL, EXECUTIVE DIRECTOR

PARALYZED VETERANS OF AMERICA

BEFORE THE

SENATE COMMITTEE ON VETERANS' AFFAIRS

CONCERNING

THE ADJUDICATION OF VETERANS' CLAIMS;

JUDICIAL REVIEW

AND

S. 11, "VETERANS ADMINISTRATION ADJUDICATION PROCEDURE

AND JUDICIAL REVIEW ACT"

AND S. 2292, "THE VETERANS' JUDICIAL REVIEW ACT"

APRIL 28, 1988

Mr. Chairman and Members of the Committee, it is a privilege for me to appear today to present the views of Paralyzed Veterans of America concerning legislation, S. 11 and S. 2292, which would authorize judicial review of certain decisions made by the Veterans Administration.

PVA would like to commend you, Mr. Chairman, for holding these hearings today. We would also like to express our appreciation to the Ranking Minority Member of the Committee, Senator Murkowski for his long-standing concern for this issue. Since judicial review legislation was first introduced in the 94th Congress, the Senate Committee on Veterans' Affairs has held nine hearings on the proposal and reported a bill out of Committee four times for passage on the Senate Floor. This meeting, however, would be the first hearing on the concept of judicial review since the reorganization of the Committee in the 100th Congress. Significantly, it would also be the first Congressional hearing on a specific legislative proposal calling for judicial review since the concept, for the first time, received formal, in-depth analysis and consideration by the House Committee on Veterans' Affairs nearly two years ago during the Second Session of the 99th Congress.

Mr. Chairman, I know that you have spent over a decade developing this issue. Your hard work and advocacy on behalf of judicial review has been accompanied by frustration in seeing no consensus develop around the concept. The Ranking Minority Member, Senator Murkowski, likewise, has worked long and hard to help build a consensus around the need for judicial review. PVA greatly appreciates his efforts as well. Proponents of judicial review are adamant in their belief that it would enable veterans to exercise a basic constitutional right they view as currently being denied. Opponents of the measure take their position in a genuine attempt to protect, in their view, a system which, in all good faith, has and does serve the vast majority of the veteran community well.

However, for the first time, through Senator Murkowski's efforts in particular, an alternative to the concept of judicial review expressed in S. 11, has been presented to this Committee and the veteran community. While PVA favors the constructs expressed in S. 11, there are many provisions in S.

2292, introduced by Senator Murkowski, which we feel have merit and are deserving of careful consideration. But, more important than just PVA's opinion, a bill, S. 2292, calling for a form of judicial review, has been introduced which has, for the first time, garnered the support and strong endorsement of additional major veterans' organizations. In this regard, Senator Murkowski's action has brought the process of consensus building a long way on this issue with two proposals before us now, each endorsing some form of judicial review.

We have advanced to the stage of dialogue where no longer are we forced to say either "yes or no" to one particular bill, but can move on to say "how to" enact the best bill.

PVA, too, has consistently reviewed its stand on judicial review over the years in an attempt to define a position which is first, reasonable, and second, protects both the rights of veterans and obligation of the VA and the courts to administer due process consistently and fairly.

By direction of PVA's Board of Directors, our organization adopted a Resolution, effective March 1, 1988, which establishes our position on judicial review. The text of this Resolution, F-88-C-2, follows:

> BE IT RESOLVED, that PVA establish as a permanent priority issue the passage of a bill awarding the right to judicial review for any veteran aggrieved by VA action or seeking benefits from the Veterans Administration.
>
> BE IT FURTHER RESOLVED, that any such judicial review Legislation prohibit findings of fact made by the VA Administrator to be subject to trial de novo by the reviewing court, that the Legislation prohibit the issuance of a judgment that both reverses a decision of the Administrator on an issue of fact and substitutes a different percentage of a service connected dis-

ability from that determined by the Veterans Administration; and

> BE IT FURTHER RESOLVED, that the Legislation direct the reviewing court to decide all relevant questions of law, interpret constitutional, statutory and regulatory provisions; compel the Administrator to act; and hold unlawful and set aside decisions, findings, and conclusions of the Administrator found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory authority; or in violation of a statutory right or procedure required by law.
>
> BE IT FURTHER RESOLVED, that the Legislation prohibit the court from addressing a matter solely on an issue of percentage rating for service connected disability; and
>
> BE IT FURTHER RESOLVED, that the legislation require that when the reviewing court is presented with new evidence that such court remand the case back to the Administrator to consider such evidence.
>
> BE IT FURTHER RESOLVED, that any such judicial review could not take place until the full administrative relief through the Board of Veterans Appeals has been pursued by the veteran, and that any compensation for attorneys be limited to not more than 25% of the original award, and that attorneys would have no further claims on compensation benefits in future periods.
>
> Effective date: March 1, 1988.

At the same time, PVA's Board of Directors also approved Resolution, F-88-C-1 which establishes our position on the elimination of the statutory $10.00 attorney's fee limitation and recommends that the VA set fee schedules for attorneys representing veterans before the Veterans Administration.

The text of PVA's Resolution F-88-C-1 follows:

> BE IT RESOLVED, that an equitable fee schedule be established for attorneys representing veterans seeking veterans' benefits, limiting such compensation to not more than 25% of the veteran's original award, with the fee schedule to be established by the Administrator of Veterans Affairs; and
>
> BE IT FURTHER RESOLVED, that such attorneys would have no further claims on future compensation benefits.

PVA strongly believes that, as in the past, judicial review should have a full hearing and be thoughtfully and judiciously scrutinized. PVA's Board of Directors was very clear on this point in establishing our most recent directive in support of judicial review. If judicial review legislation is approved, it should have its origins here and receive an independent vote in the Senate as it has in the past. It should not be attached as a rider to another bill outside the direct jurisdiction of this Committee on the Senate Floor. There should be no back-door approach to enable a veteran a day in court.

Mr. Chairman, PVA's support for the enactment of judicial review legislation does not come from the belief that the current VA adjudication system is fatally flawed or inherently insensitive to the needs of veterans. For the most part, the VA system works well. This is not to say that we have not identified certain problems within the Administrative review process which need correction.

PVA has been concerned in recent years that due to budget cuts, severe staffing reductions, and increasing complexity of claims before the VA, the agency has become less responsive in its timeliness and accuracy in claims processing. As in the case of court action against the Social Security Administration in recent years, judicial review could provide, at some point in the future, an avenue for relief to ensure that the agency is properly following adjudication guidelines and procedures based on eligibility requirements for benefits established by the Congress. However, PVA finds the current deficiencies within the VA to be an immediate problem which can, and should, be addressed by providing sufficient resources, now, for staff and training to improve the quality of VA claims processing.

Judicial review, in our opinion, should not be viewed as a magic bullet which can cure all the Agency's ills or excuse shabby claims processing. Likewise, the availability of judicial review should in no way encourage or condone any action by the Congress, the VA, this Administration, or future Administrations to permit further deterioration of the quality or timeliness of the existing adjudication process.

PVA's primary support for judicial review comes from the belief that the VA in recent years has become so intransigent in the making of certain rules and regulations and so inflexible in the interpretation of rules and law with regard to individual veterans' claims, that intercession by the courts is ultimately advisable and fully warranted. We believe that judicial review is inevitable and necessary to bring full accountability to the VA in terms of both regulation and benefit determinations.

S. 11 and S. 2292

Both of the bills before us today, S. 11, "The Veterans Administration Adjudication Procedure and Judicial Review Act," introduced by Senator Cranston, and S. 2292, the "Veterans' Judicial Review Act," introduced by Senator Murkowski provide distinct approaches to enable the courts to review VA decisions and actions.

Conceptually, S. 2292 would permit review, at the Court of Appeals level, of VA regulations only. S. 11 would provide for the review of law and regulation starting at the District Court, but would also provide for the review of individual veteran's claims as they are affected by those regulations. There is common ground between the two bills, but only up to a point. Certain provisions of S. 2292 go part of the way in bringing judicial accountability to the VA as an agency. However, based on PVA's Resolution on judicial review, we cannot endorse S. 2292. Such a limited approach would specifically prohibit individual veterans from challenging a VA determination in court on a matter of law or regulation which directly affects, or was applied in conjunction with, his or her claim for benefits.

In our opinion, the question of the veteran's right in challenging the VA's decision on an individual claim or adverse action is the central point of PVA's position on the need for judicial review. In our opinion, S. 2292 would provide court review of regulation, which is necessary, but would not permit review of the VA's interpretation of that regulation with regard to a claim.

On the other hand, S. 11 would provide a mechanism, with certain strict and necessary restrictions, as our resolution states: "to award the right to judicial review for any veteran aggrieved by VA action or seeking benefits from the Veterans Administration."

Mr. Chairman, PVA does not believe that S. 11 is a perfect bill. There are aspects of the legislation that deserve additional study, clarification and modification. In addressing these concerns, however, and in comparing the two bills before the Committee today, we support S. 11 as being a legislative vehicle which falls well within the parameters of judicial review legislation called for in PVA's Resolution.

Review of Constitutionality and Law

PVA has consistently supported judicial review of constitutional questions, questions of law and regulation in VA benefit matters. Both S. 11 and S. 2292 would substantially clarify the court's jurisdiction in these areas which have been subject to certain inconsistencies in recent years.

Currently, the VA is not formally bound in its rule-making process. There is no assurance that the VA follow Congressional intent when it makes a rule or issues directions for implementation of a statute. PVA would not want to see the Administrator stripped of his authority or discretion by the courts. However, veterans and the Congress deserve to know that implementation of the law is in keeping with the statute.

Congressional oversight of VA rule-making is quite often time consuming and not necessarily fully adapted to react to the broad range of issues, both great and small, involved in the VA's design and interpretation of its own rules and regulations with regard to individual claims. Likewise, during periods of fiscal restraint, regulations can be shaped more through the influence of the Office of Management and Budget and blatant political pressure than the intent of Congress. Most often it is these decisions which deny benefits to veterans otherwise eligible under the law, either by direct constriction of the regulation, or by the outright denial of adequate funding levels for authorized programs.

PVA has seen this happen far too often in recent years. Decisions and opinions by the VA have restricted education benefits for Vietnam Era Veterans, drastically reduced beneficiary travel allowances for needy and disabled veterans seeking medical care, and jeopardized the integrity of VA insurance policies. We have documented before this Committee well-founded reports of eligible veterans being denied their entitlement under the law for inpatient medical services and procedures. We have also seen, most cruelly, the VA denying rehabilitation services for service-connected disabled veterans unable to have children to give them the opportunity to receive certain accepted medical procedures, including in vitro fertilization, to grant them the gift of life.

In each of these circumstances, the Congress has been forced to revisit these issues within the legislative process engaging in long and lengthy debate to set the VA back on the right track. In many instances, the Congress has been ultimately successful. In others, such as the case with procreative services mentioned above, the VA can still, to this day, deny otherwise eligible veterans the full range of medical services to help overcome service-connected procreative disabilities based on a skewed General Counsel's opinion on regulation.

PVA would like to commend you, Mr. Chairman, for your foresight and compassion in taking a leadership position, based on principal, to resolve this matter over the past three years. Granting disabled veterans, both men and women, the opportunity to father, bear and raise children remains a priority for our organization. We look forward to working with you on this issue in the future.

However, is the legislative process always the best place to resolve these battles over the interpretation of law and regulation? We believe it is not. The constitution provides amply for the judiciary to be the arbiter in such cases involving both institutional policy of an agency and in defense of an individual seeking redress on a specific claim. Veterans deserve this opportunity as well.

Both bills would apply the provision of the Administrative Procedures Act contained in Section 553 of title 5 U.S.C. to make certain that the VA would be fully accountable to the complete review of its rule-making process up to the federal court level.

At that point, S. 11 and S. 2292 separate in their approach to provide court review of regulation. S. 2292 would invoke the judicial review procedures governing regulation only as contained in Chapter 7 of title 5. S. 11 borrows freely from the same language but would place the actual judicial review authorization, including the review of claims, within the context of title 38. PVA finds this latter approach more acceptable.

No matter what the scope of judicial review should become as this legislation moves through the Congress, we believe that the enacting language governing judicial review should be clearly stated within title 38 and under the direct supervision and oversight of the House and Senate Veterans' Affairs Committees.

The Administrative Process and the Board of Veterans Appeals

The Board of Veterans Appeals (BVA), the final appellate body within the VA, is bound by VA regulations (Section 4004(c) title 38 U.S.C). When the BVA is confronted with a VA regulation that may be inconsistent with Congressional intent, it lacks the authority to overturn that regulation. In that sense, the final VA appellate body is helpless in its resistance to VA regulations, and the veteran claimant is stymied in his or her pursuit of adjudicative relief.

Both S. 11 and S. 2292 address improvements to the role and function of the Board of Veterans Appeals. S. 11 would codify the existing appellate procedure and would mandate definitive improvements in the presentation and review of evidence before the Board. While further analysis of the function of the BVA is necessary regardless of the status of judicial review legislation, PVA finds these provisions to be acceptable. In particular, we strongly support the language in Section 181 of the bill which would, for the first time, amend title 38 U.S.C. to require the Board, in its determinations, to give the benefit of the doubt to the veteran when there is an appropriate balance of positive and negative evidence in resolving a claim. We also support the language in Section 103 of the bill which would require that hearings and the disposition of a claim be handled "in a timely manner."

Basically, however, S. 11 would maintain the current authority of the BVA in the review of regulation and disposition of claims. S. 2292, on the other hand, would heighten the independence of the Board and expand its authority.

The BVA, under S. 2292, would be granted the position of an interior regulatory review body. The bill would permit veterans to present both the substance of their claims before the Board as well as in a separate action challenge regulation applied within the context of that appeal. The BVA would then be empowered to rule and hold a regulation invalid, an action which S. 11 leaves entirely to the discretion of the courts.

Upgrading the powers of the BVA, an Administrative body in this fashion, is a unique and novel approach which PVA believes should have careful evaluation. Certainly, the provision is designed to provide a new regulatory review function within the Administrative process to alleviate the demands on the court and the opportunity courts might have to impose action on many routine or egregious flaws in current VA regulations. While this, in fact, might be good, in certain instances, PVA believes that the Committee should look carefully at the proposal to ascertain if a board, so empowered, might be ruling on questions of regulation involving constitutionality which might very well be beyond the constitutional authority of the Administrative branch. The Committee should also ascertain whether the newly empowered board would be given suitable and sufficient autonomy to make such rulings on regulations apart from the influence and direction of the Administrator.

S. 2292 would broaden the scope of appellate representation within the VA's Administrative process in order to allow veterans to challenge regulations before the Board. S. 11 would waive the current $10.00 attorney fee limitation, at the end of that process, only after the Board had given its initial determination in order to allow the veteran's attorney to prepare the case for court.

S. 2292 would waive the $10.00 limitation allowing attorney representation after the initial statement of the case at the regional office level in order to allow the attorney to argue the case, on the regulation only, before the BVA. From our interpretation, this would mean that a veteran would have to acquire both a veteran's service officer to prepare and present his actual claim for benefits, and an attorney to argue in a collateral fashion on his behalf to challenge the regulation.

We do not know exactly how this "dual representation" system might work or what effect it might have on the facilitation of claims processing. As we, and others, have testified before, the existing VA claims process, including the Board of Veterans Appeals, works well and is acceptable to the vast majority of veterans who present claims before the agency. Restructuring the existing system in such a dramatic fashion in order to limit court review, of what we consider would be a very small number of cases in relation to total VA case load, requires very careful deliberation.

Scope of Review - Review of Fact

PVA maintains that any proposed legislation authorizing judicial review be very specific as to the scope of review provided to the courts. Our concern stems from a need for consistency in the direction given individual courts in application of their new authority and the subsequent consistency of affected rules and regulations governed by the VA.

As we stated before, S. 2292 would invoke the judicial review procedures contained in the Administrative Procedures Act within Section 706 of Chapter 7, title 5 U.S.C. However, an individual veteran's claim would be set aside by the court and would not be part of this review process. The court could only rule on the propriety of the free-standing regulation, not the interpretation of that regulation with regard to the substance of the claims.

S. 11, in our opinion, would allow the court to address the propriety of the regulation in a much more practical manner with far greater potential benefit for the individual veteran. The bill, specifically, prohibits trial de novo, or retrial from the start, of the facts of the case. PVA believes this bar against trial de novo to be a legislative imperative. At the same time, S. 11 would permit the court to look at the case in conjunction with the governing regulations to determine if the VA's interpretation and application of those regulations in basing its determination on the claim was valid.

If the court found the VA in error in its interpretation of regulation, it could only make the recommendation that the error be corrected. It could not actually set aside or overturn that finding at this stage of the review process. The Court's recommendation would then be remanded with the case back to the Board of Veterans Appeals for reconsideration.

The scope of review of fact in S. 11 is very narrow. The court could only proceed in the review of a "material fact," one which would be deemed essential to the application of the regulation in the veteran's case. Then again, the court would only be able to review that material fact if, according to S. 11, the fact is "so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice could result if such a finding were not set aside."

Mr. Chairman, PVA believes that the courts should have access to consider certain very limited aspects of a veteran's claim in conjunction with its deliberation on the VA's interpretation of regulation. However, in accordance with our Resolution, we believe that the already narrow window of review of fact contained in S. 11 should be closed even further.

Our Resolution is very specific on this point.

> ... Be it further resolved that any such judicial review legislation prohibit findings of fact made by the VA Administrator to be subject to trial de novo by the reviewing court, that the legislation prohibit the issuance of a judgment that both reverses a decision of the Administrator on an issue of fact and substitutes a different percentage of a service-connected disability from that determined by the Veterans Administration

The resolution continues at a later point ...

> The legislation (should) prohibit the court from addressing a matter solely on an issue of percentage rating for service-connected disability.

We note that Senator Murkowski's bill, S. 2292, does preclude the appellant from challenging the validity of regulations governing the VA's rating schedule for disabilities contained in Section 355 of title 38 U.S.C.

We believe this to be a proper and advisable restriction. We would support an amendment to S. 11 which would preclude the court from ruling in the same area governing the VA's disability rating scheudle. We would support clarifying language in Section 4026 of S. 11 which would encompass the following:

> The court shall not enter a judgment that both reverses a decision of the Administrator on an issue of fact and substitutes, influences, or directs a different percentage rating of a service-connected disability from that determined by the Administrator.

The VA's rating schedule, from an historical perspective, has been authorized by the Congress, the legislative branch, and governed by the Veterans Administration, the Administrative Branch. PVA strongly believes that, from the standpoint of consistency, the judiciary should not be given the authority to set, readjust or challenge disability ratings.

District Court vs. Court of Appeals

In amending Section 211(a) of title 38 U.S.C., S. 11 would provide access to judicial review at the District Court level. S. 2292 would by-pass the District Court, sending cases directly to the Court of Appeals. On review, PVA believes the Court of Appeals would be the best entry point for VA cases within the judicial system.

Despite the expressed concerns of some, we do not believe that the court system will be routinely flooded by VA cases. If the current VA Administrative review process is given the funding and support to maintain the quality and timeliness of its service, up to and including the Board of Veterans Appeals, only an extremely small number of overall VA cases will have the standing or the opportunity to be challenged in court.

Secondly, the Board of Veterans Appeals, as it is designed at the present time, serves many of the same functions as the final arbiter of a veteran's claim as the District Court would perform in providing review of similar claims. Where review and interpretation of the facts of an individual case could be of concern within the District Court system even with the very narrow scope of review provided in S. 11, the Court of Appeals would be far less likely to concern itself with facts at all. The Court of Appeals serves a more direct appellate function which would be more appropriate to receive cases once they had been thoroughly adjudicated through the existing right of appeal and reconsideration by the Board of Veterans Appeals and the VA Administrator.

Attorneys' Fees - Quality Assurance of Representation

According to the legislation, S. 11 would lift the statutory $10.00 attorney fee limitation only after the Board of Veterans Appeals has made its initial decision. S. 2292 would lift the bar after the initial statement of the case by the VA at the Regional Office level. But, it would only do so to allow the veteran's attorney representation to challenge regulation, separate from the claim, before the Board of Veterans Appeals and later in the courts.

PVA believes that attorney representation of veteran claimants, no matter where an attorney should be brought into the adjudication or appellate process, should receive the highest degree of scrutiny in order to control and monitor the cost to the veteran and the quality of services rendered. We have several concerns in this regard which we believe should be addressed.

Section 3404 of title 38 U.S.C., in granting the VA authority to recognize agents and attorneys representing veterans before the agency, does not actually require the Administrator to perform this responsibility. Section 3404 states:

> §3404. Recognition of agents and attorneys generally
> (a) The Administrator may recognize any individual as an agent or attorney for the preparation, presentation, and prosecution of claims under laws administered by the Veterans Administration. The Administrator may require that individuals, before being recognized under this section, show that they are of good moral character and in good repute, are qualified to render claimants valuable service, and otherwise are competent to assist claimants in presenting claims.
> (b) The Administrator, after notice and opportunity for a hearing, may suspend or exclude from further practice before the Veterans Administration any agent or attorney recognized under this section if the Administrator finds that such agent or attorney-
> (1) has engaged in any unlawful, unprofessional, or dishonest practice;
> (2) has been guilty of disreputable conduct;
> (3) is incompetent;
> (4) has violated or refused to comply with any of the laws administered by the Veterans Administration, or with any of the regulations or instructions governing practice before the Veterans Administration; or
> (5) has in any manner deceived, misled, or threatened any actual or prospective claimant.
> (Amended P.L. 99-576,§701(80).)

PVA believes that the loose authority implied by the use of the word "may" in this Section should be closely scrutinized to develop a proposed amendment which would require the Administrator, through the word "shall," to monitor more closely the credentials and performance of attorneys who would be new to, and unfamiliar with, the VA's adjudication process and the true needs of veterans.

PVA believes that proper certification should not only be limited to attorneys, but should be applied uniformly to anyone representing veterans before the VA or working on their behalf. This review and certification should apply to veterans' service officers as well as agency employees. This opportunity could go a long way in maintaining quality assurance by enforcing standards which ensure that all representatives operate from the same base of knowledge concerning veterans' programs, needs, and concerns.

Additionally, such scrutiny should not be applied only upon initial accreditation of the individual, but should be routinely implemented to ensure quality representation at all stages of the adjudication process.

Attorney Fee Limitation

Both bills would set similar limitations on attorney's fees and would limit contingency fees for attorneys to 25% of past due benefits in an award. PVA believes these limitations are necessary and appropriate. We believe, however, that the VA should have additional authority and responsibility to monitor and set appropriate fee schedules in accordance with other statutes to ensure that attorney compensation properly reflects the work product provided by the attorney.

We would also support an amendment to S. 11 similar to language in S. 2292 which would extend protection and coverage to the veteran claimant under the provision of the Equal Access to Justice Act.

Test Period for Judicial Review Authorization and Retroactivity

S. 11, but not S. 2292, would establish a five-year test period for the authorization allowing veterans access to judicial review. Enactment of judicial review legislation would be breaking new ground. PVA believes it would be totally appropriate to provide this initial five-year period of implementation to allow the Congress and the veteran community a point-in-time to stop, evaluate and modify the authorization, if necessary, to best meet the needs of the veteran community.

At the same time, as the legislation would be establishing new authority for appellate review in the courts, PVA supports the provision in Section 502 of S. 11 which addresses the question of retroactivity of cases for appeal by stating that court review of claims could only be instituted to review decisions of the Board of Veterans Appeals rendered on or after April, 1, 1987.

Additional Concerns

The authorization of judicial review of veterans' claims, and rules and regulations governed by the VA provides the opportunity to address and re-evaluate many aspects of quality in the provision of the entire gamut of veterans' benefits and services.

The scope of judicial review and appellate reform in both S. 11 and S. 2292 is directed primarily at the Board of Veterans Appeals and the courts. The primary focus, again, is considered by many to fall only on the review of benefit determination, such as compensation, pension, education benefits, etc. If, as PVA supports, the Congress is to expand due process for veterans in this fashion and encourage additional accountability for the VA before the courts, there are other areas of VA responsibility which should be addressed, either in the context of this legislation or certainly in a collateral fashion by the Congress.

1) S. 11 would codify appellate activities in Board of Veterans Appeals determinations. Reviewing these procedures and placing them in the statute provides a strong and consistent endorsement by the Congress for that level of review. PVA believes that the Committee should also revisit claims adjudication and appellate proceedings prior to the Board of Veterans Appeals to ensure consistency in the entire Administrative Review process.

2) Veterans organizations, including PVA, have had difficulty in challenging VA regulations in court on behalf of their membership and all veterans. While certain courts have ruled that associations do have this right as representatives of their membership, the law is far from clear on this point. Veterans' Service Organizations, chartered by the Congress, have an exceptional responsibility in that they represent not only their own membership, but the veteran community at large. We would hope that within the context of S. 11, or in conjunction with the Judiciary Committees, this Committee could analyze this dilemma and recommend a solution to resolve the current ambiguity of this question of "standing" before the courts.

3) PVA, over the past two years, in the course of working with other veterans' service organizations to develop the Independent Budget for the Veterans Administration, has identified a major area of the VA's benefit and service delivery system which affords the veteran little

or no formal appellate rights or specific appeals processes: The Department of Medicine and Surgery.

Revised eligibility criteria mandated by the Congress through Public Law 99-272 have, for the first time, established definitive entitlement for certain health care services provided by the VA, and yet, we have identified certain areas in the provision of that care where the VA is routinely denying access or rationing treatment to otherwise eligible veterans. At present, veterans have very little access to a process through which they can appeal these decisions.

As we have testified before this Committee earlier this year, examples of three general types of health care access denial are:

1) Local denial of approval for expensive elective surgery due entirely to inadequate dollar resources. The example given during the Independent Budget telephone survey was total hip replacements. It may well be, therefore, that local restrictions are applied to other costly hospital procedures.

2) Denial of telephone requests from private hospitals for transfer of costly long term hospital care Category A veteran patients to VA hospitals.

3) Restricted access to outpatient care for NSC veterans whose ambulatory care would obviate the later need for hospitalization.

The revised entitlement specified in P.L. 99-272 clearly mandates the right to inpatient care by the VA for all Category A veterans. Therefore, the above examples 1 and 2 are violations of statute. Example 3, however, becomes a matter of professional judgement regarding proper interpretation of the "obviate clause," although it appears the pressure for cost containment has often replaced professional judgement in this decision making. The answer to this latter problem lies in legislative action to grant categorical entitlement for ambulatory care to certain additional Category A patients, which was agreed to recently by House and Senate Veterans' Affairs Committee Conferees in H.R. 2616.

Examples 1 and 2, above, are forms of rationing on a completely arbitrary and inequitable basis. With the aging of America and the continued escalation of health care costs, rationing may yet be legislated. However, at present, rationing is not authorized under Category A for the Veterans Administration. Meanwhile, it is not unreasonable for a veteran who is denied a health care benefit, to which clear entitlement exists, to have an appeal process no less effective than any review process provided for VA compensation claims. It is also not unreasonable to require the Department of Medicine and Surgery to establish an Administrative appellate review process which could address in a timely fasion the concerns of veterans denied access to medical care.

It may be argued that resorting to judicial review for this purpose would, unfortunately, put the veteran patient in an adversary position with his physician, delay the onset of the requested treatment and impose upon the court the responsibility for exercising professional medical judgement. The latter circumstance is no different than what exists in malpractice suits.

The adversary aspect can be circumvented by referral of the patient to another VA hospital not involved in the original denial. The delay factor would not be critical in the case of elective procedures. Delayed authorization is certainly to be preferred to an unchallengeable denial of legitimate access to VA medical care.

Finally, the very presence of such an appeal option would serve to discourage arbitrary rationing of health care benefits under Category A entitlement and would provide the Committee a new and important mechanism by which it could monitor how, and if, the VA is providing health care in accordance with the law.

Medical benefits, in this regard, should be clearly defined and specified to include not only medical and surgical care, but such adjuncts as prostheses and adaptive equipment.

From our analysis, neither S. 11 nor S. 2292 would provide definite relief in this area. We hope the Committee could address this major gap in due process for veterans seeking benefits required by law from the VA.

Conclusion

Mr. Chairman, PVA believes we have an opportunity to do both what is right and best serves our nation's veterans. PVA strongly supports the passage of S. 11 hopefully with the inclusion of those modifications which we have enumerate today. Should S. 11, with amendments, pass the Senate, but fail to become law, we believe your efforts will offer an excellent starting point for renewed action at the beginning of the 101st Congress for judicial review legislation.

Mr. Chairman, this concludes our testimony. PVA supports the authorization of judicial review for veterans' claims, VA rules and regulations. We look forward to working with you and this Committee to ensure enactment of appropriate legislation to accomplish that goal. I will be happy to answer any questions you might have.

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STATEMENT OF

VIETNAM VETERANS OF AMERICA, INC.

Presented By

RICHARD E. O'DELL
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and

CHAIRMAN OF VVA'S
COMMITTEE ON ADVOCACY

and

PAUL S. EGAN
LEGISLATIVE DIRECTOR

before the

SENATE VETERANS AFFAIRS COMMITTEE

on

JUDICIAL REVIEW

APRIL 28, 1988

I. INTRODUCTION

Mr. Chairman and members of the Committee, the Vietnam Veterans of America, Inc. (VVA) appreciates the opportunity to present its views on legislation to authorize judicial review of claims adversely adjudicated by the Veterans Administration (VA). Our position on judicial review is not only well known to this Committee, but to anyone having been associated with the conduct of veterans affairs either in or out of the Congress. For many years the VVA has believed, perhaps naively, that this matter could be resolved on the force of the best arguments brought to bear on the issue. With no resolution of this matter in over nine years and in spite of having advanced the most cogent arguments, which happen to favor judicial review, we are now much more skeptical.

Over the course of the nine years of debate on this subject, successive bills passed by the Senate in each of the last four Congresses have gone through a painstaking metamorphosis. Adjustments have been made to accommodate what most were led to belive were the legitamate concerns of the other veterans service organizations. Yet, as was vividly demonstrated in 1986 when the House Committee on Veterans Affairs held hearings on the subject of judicial review, almost all of the other veterans groups opposed judicial review in any shape or form whatsoever by transparently airing their opposition at the specific bill, HR. 585, under consideration at that time. This adjustment of stance, from that of expressing legitimate concern to the Senate Committee in the spirit of constructiveness to one of expressing outright opposition, however facilely, to any and all forms of judicial review to the House Committee, constitutes a public demonstration of disingenuousness that ought not to be missed as the debate over this issue is joined once again on the Senate side of Capitol Hill. This is especially true given the recent support of the DAV and the VFW for legislation very recently introduced by Senator Murkowski.

For one or two of these organizations, the performance on the House side in 1986 revealed an agenda on judicial review that has probably existed since this matter first surfaced. For others, national resolutions approved by respective national conventions and policy-making bodies were either overturned or ignored. In one instance an organization was compelled to withdraw a statement supporting judicial review under threats of reprisal against that group's other legislative goals. The VA itself circulated a memorandum suggesting to the other veterans groups that free office space and telephone service might cease if judicial review were enacted.

Mr. Chairman, on January 6, 1987 when introducing S 11 you stated that, "I do not believe finding fault with the current system is a necessary step in making the case for judicial review. Rather, I believe the appropriate first question is whether there is any continuing reason ... for denying veterans the same right or access to court review of VA benefits decisions that is available in the case of virtually every other Federal benefit." By now it ought to be clear that your first question has been answered repeatedly and unassailably. In response, recalcitrant opponents have resorted to all manner of distortion, innuendo and, in some instances, intimidation in order to prevent enactment of judicial review. That being so, it is tempting to assume that answering the question of what is wrong with the current system presents itself as perhaps the only remaining course.

Since 1986, the VVA has learned a great deal about the way the VA administers its adjudicative functions at Regional Offices (RO) and at the Board of Veterans Appeals (BVA). In 1986 we expressed the view that the VA's system of providing benefits was basically sound but that inevitable mistakes must be allowed to be corrected by the courts. In light of the VA's Compensation and Pension service handling of its responsibilities prior to and during the NARS trial, these sympathies can no longer be expressed. Given what we have learned about operations at the "Supreme Court" of VA appellate adjudications -- the BVA -- we have come to conclude that veterans pursuing their claims are forced to do so by relying on an adjudicative environment so fundamentally flawed and so institutionally corrupt, that no amount of gerry-rigging in the absence of judicial review will be sufficient to assure fairness.

Even as the VA and its minions among the older veterans organizations lobby hard for elevation of the VA to Cabinet rank, officials of the agency have demonstrated over and over again in Congressional Committee testimony that they are unwilling to be accountable to anyone. Employees within the agency coming forth with information verifying the worst suspicions about agency abuses are harassed, demoted and forced to retire. The most recent public spectacle of intimidation, in this connection, occured on March 28 of this year at a hearing held by the Senate Governmental Affairs Committee. In responding to a question by Chairman Glenn, the VA's Chief Benefits Director stated that the VA's error rate in claims was one percent. Pursuing the issue further, Chairman Glenn pressed the Director of VA's Statistical Quality Assurance program, who was standing in the back of the hearing room, for an answer to the same question. A visibly shaken individual -- the man in charge of statistical quality measurement — stumbled verbally before stating that he was not in a position to answer the question.

At an earlier hearing in February the Chief Benefits Director told a House Government Operations Subcommittee that the VA doesn't keep statistics on "regional" errors. Documents provided to VVA on error rates in compensation and pension claims clearly demonstrate that the VA does maintain such statistics and that the overall compensation and pension error rate is significantly higher than one percent. In fact, two days following the March 28 Governmental Affairs Committee hearing, we received these documents from an anonymous employee at the VA. Between October 1 and December 31 of 1987 the RO in Los Angeles, for example, had a substantive error rate of 21.2 percent.

For all of Fiscal Year 1987, the LA Regional Office had a substantive error rate of 19.5 percent. In this regard it should be noted, perhaps not surprisingly, that of all Regional Offices the Los Angeles office ranks number five in the nation in claims remanded by the BVA. In any event, the claim of a one percent error rate is soundly contradicted by the overall statistical data on regional compensation and pension claims made available anonymously to the VVA. Perhaps the Chief Benefits Director is referring to an error rate in some other category. Whatever other category he may be referring to, we find it hard to believe it would be more significant than in the category of compensation and pension.

For those who defend opposition to judicial review by pointing to the agency claims process as non-adversorial, the recent well known demotion and subsequent reprimand of BVA Board member Ernest Wright needs some explaining. Mr. Wright responded to media coverage of an October 6, 1987 House Veterans Affairs Subcommittee hearing on the BVA by contacting key players on the Hill with information substantially verifying the charges made by the VVA of systemic unfairness to veterans at the BVA. Mr. Wright was subsequently demoted for alleged deficiencies in both claims production quality and quantity. Apart from the fact that this is the first time in the history of the BVA that a Chief Board member has ever been demoted to Associate member, Board members are exempt from quality evaluations. We are advised, however, that this demotion was done with the advance concurrence of the Administrator.

Even though Board members are exempt from quality assessment they are subject to quantitive production assessments. This might serve as a legitimate reason for demotion except for one striking fact. Beginning in 1982, the BVA was exempted by Executive Order from the Merit Pay System prescribed under Chapter 54 of Title 5 for the specific reason that maintaining Board independence might be compromised if there were any appearance that decisions could be influenced by salary increases. With this in mind it should be remembered that production statistics are maintained at the BVA for purposes, among others, of awarding year-end bonuses to Board members exceeding production quotas.

In 1985 the BVA was again provided with an exemption, under Executive Order, from Title 5. In this instance the exemption was from the Performance Management and Recognition System. Once again the purpose was to assure the BVA's independence and to shield the Board from the appearance of improper decision-making based on performance evaluations.

Moreover, it would appear that if the BVA, by two Executive Orders, is intended to be free from performance evaluations, the existence of production quotas and year-end bonuses constitutes an unambiguous violation of law. For Mr. Wright to have been demoted on the basis of either qualitative or quantitative deficiencies with the Administrator's concurrence is, in our view, a patent example of employee intimidation and constitutes yet another instance in which the agency deliberately places itself above the law.

Mr. Wright's demotion was followed by a reprimand. We are advised that the reason given was his contact of a veteran whose claim had been, in Wright's view, unfairly denied. Presumably, Wright was attempting to advise the claimant on the further pursuit of his claim. Under the circumstances, how can it be said that the VA assists veterans in the development of their claims, that reasonable doubt is resolved in favor of the veteran or that agency adjudications are non-adversorial when a BVA employee is reprimanded for attempting to provide those very services?

II. BVA DEFICIENCIES

In addressing the issue of judicial review, as already stated, we believe it is fundamentally important to note that the VA is functioning poorly in its handling of veterans claims. Since September of last year the VVA has focused a great deal of attention on this issue with particular attention having been paid to the BVA. Since this Committee intends to hold hearings on the operations of the BVA at a later date this year, this statement's discussion of what we have discovered at the BVA will be limited to a brief summary.

First of all there are variances in decision-making by Board sections on claims that are not only similar but, as acknowledged by the BVA Chairman in 1985 and again last October, "equal and identical". The Chairman has stated that he finds no particular problem with this, however, because Board sections as well as Board members are supposed to be independent in their decision-making. We believe this practice to be in violation of 38 CFR 3.101. Even if not, we find this potential decision-making phenomenon to be indefensible for any final arbiter of disputes, either adjudicative or judicial.

Along with variances in decisions, there are also variances among sections in allowances, denials and remand rates. The reasons for this may be several but we have learned that some sections and some Board members are known within the BVA, and by the BVA Chairman, to be "denial prone."

Production quotas are the dominating influence at the BVA. Nearly every aspect of operations at the BVA is colored by the requirement to meet production quotas. Stemming from production quotas, extra-regulatory and extra-legal devices have been created informally to accomodate production goals.

The most significant of these production-facilitating devices is the widespread use of "courtesy signatures." This is the practice by many Board members of signing a decision without reading the file as a courtesy to another Board member or section. Under current guidelines the Board sections, consisting of three members each, are supposed to share in the development of decisions on appellate claims. Instead, decisions are developed by one or two section members and courtesy signatures are given by one or two of the other section members. A variation on this occurs when section members go outside of their own section to secure one or two courtesy signatures from another section.

Remands are another device for production enhancement. The practice we refer to here occurs when sections are either behind quota goals or are attempting to win year-end bonuses. Under the circumstances, cases are remanded back to the originating Regional Office because it takes very little time to remand a case. Importantly, when this is done the same production credit is awarded as would have been the case if the time had been taken to decide the case.

Quality and thoroughness under production quotas are obviously affected. One retired Board member testified before a House Government Operations Subcommittee in February that sections exceeding 100 cases per week spend an average, according to his calculations, of eight minutes per claim.

Year-end bonuses are available to Board members who exceed production goals. The availability of these bonuses most certainly spur production while simultaneously detracting from quality and thoroughness. As discussed in the introduction, this practice seems to us to constitute a violation of at least one and possibly two Executive Orders issued since 1982.

One of the more egregious aberrations resulting from availability of bonuses is the holding back of decisions for months at a time. Under the bonus system currently in effect, Board members are eligible to receive bonuses every other year. For some Board members having received a bonus one year, claims decisions are withheld until the next available bonus eligibility year. This means unnecessary delays in the rendering of final decisions for some veterans of up to 12 months. Those who argue against judicial review on the basis of long delays in court decision-making, should take note of this particularly insidious BVA practice. When this practice is used, the intention is usually to get a substantial jump on established production goals during the bonus eligibility year.

III. JUDICIAL REVIEW

From welfare and social security recipients to illegal aliens, and even military personnel, access to the American system of justice in disputes with the government is taken for granted. We feel that it is, in fact, more incumbent upon opponents to convince this committee that this right should be denied to American veterans than it is upon us to make the case to grant equal access to the courts.

Nevertheless, the testimony we present today will make a convincing case for granting judicial review of Veterans Administration claims. In the process of making this case, we believe that we have already fully addressed the major arguments of opponents.

The Need For and Importance of Judicial Review

A. Judicial Review Is Needed Because America's Veterans Deserve It

Our American form of republican democratic government is based on a system of checks and balances implemented through three coequal branches of government: legislative, executive, and judicial. The creation of the checks and balances by our founding fathers did not reflect a judgment by these men that any particular evil lurked in any of the institutions they had created. To the contrary, it was a measure to ensure a fair and judicious system of government answerable to the people, respectful of their rights, and offering individual Americans alternative avenues of relief should one branch of government be unresponsive to their petitions.

In this system, one important role of the judicial branch is to resolve disputes between the executive branch and individual Americans. This role is vital because, although Congress has the authority to check some executive action (by oversight of the agency in the VA situation), the judiciary is essentially the only check on executive authority as it affects a specific action on an individual citizen. This check is simply part of the structure of our system of government designed to protect the privileges which are the birthright of every American.

To fully appreciate why court review of VA decisions is needed requires an understanding of how Congress has generally followed the founding fathers' vision in the context of federal administrative agencies. The current statutory bar to court review of VA decisions came into existence in 1933, when there were very few federal agencies other than the VA. Since that time the federal government has grown tremendously and Congress has created numerous federal programs and agencies. Almost without exception, Congress has provided citizens access to the courts to resolve the disputes that inevitably arise between the agencies and the parties who appear before them.

Thus, persons who are denied food stamps, SSI, medicaid, AFDC benefits, as well as prisoners and those threatened with deportation, are all entitled to their day in court. Even military personnel can obtain court review of the numerous disputes that arise between soldiers and the military departments — including issues like promotions, performance evaluations, retirement benefits, disability decisions, and criminal punishments.1/

The root reason that Congress has provided federal court review in all these situations is simply that no agency should be allowed to make decisions unchecked. This is not just because agencies invitably make mistakes by interpreting the law improperly or improperly interpreting or weighing the evidence before them. And it is not just because agencies are inevitably subject to political pressures in administering their programs. Congress has provided time and time again for review by an independent federal judiciary which is appointed for life because, aside from any problems in agency decision making, Americans have a right to their day in court. Americans have the right to benefit from the system of checks and balances bequeathed them by those who founded our nation.

The customary justification for allowing courts to review a federal agency's decisions is therefore not based on any judgment that the agency is more prone to make erroneous decisions than other agencies (the possible exception being the VA). The fact that courts are authorized to review decisions of the Immigration and Naturalization Service, the Social Security Administration, the Merit System Protection Board, the Board for Correction of Military Records, and almost every other federal agency is not attributable to a Congressional judgment that these agencies are not competent or effective. It is due rather to the rule of law and system of checks and balances which underlies our federal system.

B. Judicial Review is Widely Supported For Many Reasons

The VA is one of the largest federal agencies in terms of the amount of money it provides in public assistance. In fiscal year 1987, nearly $15 billion was given by the VA to over 4 million veterans and their dependents in compensation, pension, educational and other benefits. The Board of Veterans Appeals annually reviews over 40,000 claims under these programs and regularly approves approximately 13% of all claims.

It is plain that compensation, pension and educational assistance benefits are often critical to veterans and their dependents. They are basic components of the safety net for millions of those who served our country honorably. Yet, under the current Section 211(a) of Title 38, all of the VA decisions in these areas are barred from court review.

At the last House and Senate hearings on judicial review prior to 1986, every veterans organization which testified -- except for the American Legion -- supported some form of judicial review of VA decision-making. The supporters included the Veterans of Foreign Wars, the Disabled American Veterans, the Paralyzed Veterans of America, the Jewish War Veterans of the

U.S., the National Association of Atomic Veterans, the Retired Officers Association, the American Veterans Committee, and Veterans Due Process. Below are some of the reasons VVA and the other organizations felt that judicial review is needed.

1. VA Errors

Although the need for judicial review does not hinge on VA errors, it is beyond dispute that the VA too frequently makes erroneous decisions. Recent oversight hearings of the BVA makes this clear. For example, the following exchange took place during these hearings between Congressman Applegate and Kenneth Eaton, Chairman of the Board of Veterans Appeals:

Mr. Applegate:

> Later on we will be receiving a comment from a witness about allowance rates from the various sections of the [BVA], and that perhaps some panels have consistently lower allowance rates than others . . . . Have you observed this and, if you have, do you have any comments about it.

Mr. Eaton:

> Yes, indeed, it is quite true that there is what I might say is a significant variance between different sections of the Board and how they see these cases . . . There are a couple of sections, or Board members, I suppose, who are rather low in their allowances. But, you know, you can't tell them what to do. . . .

Mr. Applegate:

> You can have equal cases, identical, where one will get more than the others,

Mr. Eaton:

> I'm afraid so.2/

Also at these BVA oversight hearings, the American Legion testified that

> As an important part of our involvement with the issue of veterans suffering from post-traumatic stress disorder (PTSD), we have given special attention to reviewing the decisions of the Board of Veterans Appeals involving claims for service connection or an increased rating for PTSD. There have emerged from this on-going review several problems which have been brought to the attention of the Chairman of the Board of Appeals and other VA officials without satisfactory resolution.
>
> In our judgement too many valid claims are being denied by the regional offices, and the denials are subsequently confirmed by the Board of Veterans Appeals.3/

VVA has observed this problem as well.

The Veterans of Foreign Wars, in testifying for judicial review has focused on wrongly refused claims and the sense of unfairness veterans feel in being denied judicial review:

> 1. There are those who believe a system which permits Welfare or Supplemental Security Income recipients to seek court relief but denies the same forum to veterans is flawed.
> 2. Many Vietnam veterans are aware that the Veterans Administration, in concert with the President's Office of Management and Budget, attempted in 1973 to rewrite the rating schedule to their disadvantage, believe the VA has been insensitive to their needs and are disenchanted believing they have not received timely, full, fair and impartial consideration of their appeals. Claims of older veterans are often viewed with a jaundiced eye simply because they deferred filing. In the absence of substantiating service medical records "buddy statements" by former prisoners of war and other knowledgeable witnesses are nearly always discounted as having been made from "remote memory."
> 3. One of the most frequently heard complaints by our national officers in their travels is the complete frustration of those whose claims have been denied and due to the finality statute of 38 USC 211(a) are foreclosed from redress through court action.
> 4. Many service officers are increasingly disappointed

> in the denial of cases which they believe have considerable merit. Also, they wonder why over the past eight years the percentage of cases allowed by the Board of Veterans' Appeals has fluctuated only a little over two percent whether that body considered 25,000 cases in the year or more than 35,000 cases.4/

2. Legal Expertise

One attraction of judicial review is that it would afford the veteran an opportunity to have some of the many legal decisions made by the VA reviewed in a forum well suited for deciding such questions. The need for such review can be seen by examining the role currently played by agency lawyers in the VA adjudication process (see Appendix A).

Lawyers are an integral part of any VA adjudication. They are sometimes involved at the Regional Office level and are intensely involved at the appeals level.

Although the VA's handling of a claim's adjudication is dominated by lawyers, the veteran's representative is rarely similarly qualified. Also, VA attorneys plainly do not have the qualifications of a federal judge in interpreting the law. The VVA submits that a legal process that requires the VA's own lawyers to exercise "a high order of original and creative endeavor based on extensive research of the most complex legal and medical problems" is precisely the sort of process that should be subject to independent court review (see attorney job descriptions attached as Appendix B).

3. Limitations in the BVA's Power

Another problem pointing to the need for judicial review was demonstrated by the Paralyzed Veterans of America in its 1983 testimony supporting judicial review:

> The Board of Veterans Appeals lacks the independence and the authority of courts of law. . . . [T]he BVA is, itself, bound by VA regulations (38 U.S.C. 4004(c)). Hence, a circu[lar]ity arises when the BVA is confronted with a VA regulation that is inconsistent with congressional intent — the Board lacks the authority to overturn that VA regulation because it, too, is bound by a VA regulation. In that sense, the final VA appellate body is helpless in its resistence to VA regulations.5/

4. Power of the General Counsel and Political Decision Making

The role of the VA's General Counsel in BVA decision-making reinforces the need for judicial review. Each year the VA's General Counsel issues dozens of legal opinions which, by statute, bind the BVA in its decision-making.6/ The VA's General Counsel is appointed by the VA Administrator and serves at his will. The VA Administrator is appointed by the President. Plainly, the VA General Counsel's view of the issues covered by his binding legal opinions is colored by the fact that he or she serves the VA Administrator. Also, how the VA General Counsel interprets a particular statute often has an impact on the VA's budget. The Paralyzed Veterans of America summarized the problem as follows:

> [J]udicial review . . . should greatly help alleviate some of the problems we have seen when the Executive Branch has thwarted congressional intent. The VA has had to defy congressional intent at times in order to comply with guidelines established by the Office of Management and Budget. On many occasions in the 96th and subsequent Congresses, the Committee on Veterans' Affairs have stated to the VA Administrator and to the Director of OMB that some of their rulings have not conformed to congressional intent. Yet, Congress appears more often than not to have some problem ensuring that the VA properly implements its mandates.7/

In the context of current budget restraints and the likely agenda for the VA's future budget, this problem will no doubt be exacerbated.

A federal judge who is truly independent and whose job is not affected by how he or she decides an issue is likely to view the legal issue presented from a different perspective than does the VA. This is, in fact, a federal judge's role in our constitutional system of checks and balances.

C. Judicial Review is Needed to End Discrimination Against Less Advantaged Veterans

The growing number of citizens who advocate judicial review of VA determinations often base their support on the argument that veterans should have equal access to the courts with non-veterans. The Vietnam Veterans of America believes that an important, and often overlooked, reason why Congress should authorize court review, is that the current system unfairly discriminates against the average veteran, by allowing court review to many upper-income veterans, usually former officers, but not to the average veteran (see Appendix C).

Little mention has been made before this Committee that there are two separate systems for providing compensation for service-related injuries. One is administered by the military departments and one by the VA. An eligible veteran must choose under which of the systems he or she will receive benefits. This decision is usually based on which system will pay benefits at a higher rate.8/

The two systems are similar (Appendix C lists the similarities which include the reasonable doubt rule[9] and a common rating schedule[10]), but the method of calculating benefit amounts is different. Under the military system, the amount depends directly on the soldier's base pay, and thus rank, at separation (higher base pay/rank means greater benefits). Under the VA system, however, the compensation rate is the same no matter what the veteran's military pay and rank. The result is that former officers and higher ranking enlisted personnel choose the military system while average veterans choose the VA. As one authority has stated,

> Disability retirement pay from the Armed Forces and VA compensation . . . are in a sense components of a single program. The service member receives compensation [from the military] for his disability . . . based on pay, but the VA provides minimum compensation for those whose base pay is on the lower end of the pay spectrum. The total system provides income protection for those with higher incomes, and a minimum-level stipend for those with low incomes.[11]

The greatest problem in this system is that there is no court review of VA decisions while all decisions made in the military program are subject to review by United States District Courts or the Claims Court (after administrative channels have been exhausted at the Boards for Correction of Military Records).[12] The injustice here is that the effect is to leave the courthouse door open to higher ranking personnel while shutting it on the average veteran. This is one of many examples of the unfairness perpetuated by the current bar to judicial review of VA decision-making.

D. Judicial Review is Needed to Remedy the Gross Unfairness of Allowing the VA Special Advantages When Suing Veterans, But Not Allowing Veterans to Sue the VA

Another gross injustice perpetrated by the current bar to judicial review is that the Veterans Administration can sue veterans when the VA believes the veteran owes the VA money, but when a veteran believes the VA owes him or her money, the veteran is barred from the bringing suit. Each year, the VA sues tens of thousands of veterans in United States District Courts because, according to the VA, the veteran owes the VA money. Since 1980 over one quarter of a million lawsuits have been filed by the VA against veterans.

As one District Court Judge summarized the situation in his jurisdiction,

> almost half of the civil cases filed in this division [the Western District of North Carolina] the first half of 1983 were [lawsuits filed by the government against a veteran to recover money allegedly owed to the VA]...The court is not aware of any case in which the veteran has been represented by a lawyer.13/

One of the most striking things about these cases is that the VA argues, and courts have held, that under the current bar to judicial review, veterans do not even have the right to defend themselves when the VA has sued them.14/ In other words, the judge has no choide but to rubber stamp whatever amount of money the VA says the veteran owes even if the veterans can prove conclusively that he does not owe the VA any money.

In sharp contrast to where the VA lays claim to a veteran's funds, when the veteran believes that the VA owes him or her money, the courts cannot even consider the claim. It is a grossly unfair system of law which would allow A to sue B, but prevent B from suing A. Under current law, however, the full power of the United States can be used to sue those who served our country honorably in time of war, but these same citizens who risked their lives to defend our country are prevented from filing a lawsuit to seek review of a decision of this same federal agency. It is high time that this injustice is corrected.

IV. THE ARGUMENTS ADVANCED BY THE OPPONENTS TO JUDICIAL REVIEW ARE NOT PERSUASIVE

A. The VA Benefit Claims Process Generally Works Well, So Why Try To Fix It

One of the arguments advanced by the people opposed to judicial review is that the VA benefit claims process generally works well, so why try to fix it. This argument, discussed in section I above, misses the point of having court review. The point is that the right to judicial review is fundamental to the system of checks and balances upon which our nation's government is based. Also, the VA makes many mistakes and federal court judges can correct these errors and make the benefit system work as it was intended to work. Additionally, judicial review can be expected to protect the veteran when the VA decision-making process becomes dominated by Office of Management and Budget directives.

Most federal agencies are generally fair; nevertheless, they are not, as with the VA, placed above the law. Congress has almost without exception given courts the power to correct agency mistakes. There is no good reason to treat the VA and the veterans who apply to it any differently.

B. Allowing Judicial Review Would Be Too Costly

Another argument advanced by the opponents of judicial review is that the cost of judicial review would be too great, and our already overburdened federal courts would be flooded with lawsuits. There are two independent flaws in this argument. First, it is grossly unfair to single out veterans for exclusion from the court system based upon the cost of running our government when the same cost analysis has not been used to bar prisoners, welfare recipients, illegal aliens, or military personnel from the court system. All of the latter groups are not denied their day in court in order to save court costs. There is no good reason to discriminate against veterans in allocating the costs of running our government.

The second flaw in the argument about the cost of judicial review is in the estimates used. The key question is what percentage of the 35,000 to 45,000 claims denied by the Board of Veterans Appeals each year will be taken to court if judicial review is allowed. This is obviously a speculative question but, according to CBO estimates, the first year's cost of S.11 would be $2 million and in the first five years the cost would be $16 million.

Apart from this an appropriate analogy for purposes of determining what the court costs will be if judicial review is allowed is judicial review of decision-making by the Board for Correction of Military Records. The BCMR administers a system very similar to the system administered by the Veterans Administration (see Appendix C). As explained in Section III-C of this testimony, the Boards for Correction of Military Records adjudicate military disability compensation claims, which are similar to service-connected disability compensation applications filed with the Veterans Administration. The percentage of Board for Correction of Military Records denials that go to federal court is very small. The VVA understands that approximately 2% of all BMCR denials end up in court.

C. Allowing Judicial Review Will Change The VA Adjudicative Process Into An Adversarial One In Which The Veteran Will Not Be Given The Benefit Of Reasonable Doubt

This next argument advanced by the opponents to judicial review has no evidence to support it. There is no reason to believe in the first place that merely having court review of an agency that is set up to be non-adversarial and to give the veteran the benefit of reasonable doubt would change if courts are allowed to review their decisions. For example, the Boards for Correction of Military Records have for decades been non-adversarial in nature. For decades, BMCR decisions have been subject to judicial review. For decades, service officers of the older veterans organizations have represented BCMR applicants. Court review has not changed the nature of the BCMR decision-making process and has not impeded representation by veterans service representatives. The opponents of judicial review have been unable to suggest otherwise.

It has been argued that court review of the BCMR has inadvertantly brought about an adversarial environment. The testimony of Mr. Keith Rosenberg before the House Committee on Veterans Affairs on June 24, 1986 is the only argument of its kind that has ever been ariculated as far as we know. The thrust of his remarks is that court-made rules limiting judicial review of Military Correction Board decisions have caused a backlash at these Boards which have begun to create similar Board-made rules. He also bases many of his assumptions on the misunderstanding that the VA adjudications process is without flaws.

The VVA's lawyers have lengthy experience before the Military Correction Boards. After Mr. Rosenberg's 1986 testimony, they canvassed many members of the bar who regularly practice before the Correction Boards. Suffice it to say that Mr. Rosenberg's views are peculiar only to himself. It is also unlikely that he would use his argument to make a case against continued judicial review of Military Correction Boards. Whatever problems he is encountering at these Boards may very well be attributable to personnel changes and difficulties at the Secretarial review level. Most members of the "military law bar" would concur with this assessment. (see Appendix D for examples of letters opposing Mr. Rosenberg's position, including one fro a former Executive Secretary of a Correction Board).

The argument is also flawed because the bill at hand makes statutory the requirement that the VA keep its non-adversarial system. It requires, as a matter of law, that the VA give veterans the benefit of reasonable doubt. (This is not even a statutory requirement now.) It requires the VA to keep its current system on re-opening claims, which is very liberal. It requires, as a matter of law, the VA adjudicative process remain nonadversarial. Thus, the opponents of judicial review who argue that if S.11 is passed, the VA system will change to the detriment of the veteran are arguing, in effect, that the VA will violate the law. There is no basis for this belief, and the VVA views this argument as unfounded and illogical.

In fact, logic and experience suggest that Board of Veterans Appeals members will tend to hestiate before denying a veteran's claim if they know that the veteran can go to court and call the Board member's judgment into question. As it stands now, the Board of Veterans Appeals is a veteran's last resort, and Board members know that they do not have to answer to anyone for their decisions.

D. Judicial Review Would Not Improve the Quality of Justice Because Judges Are Not Better At Deciding Whether Veterans Deserve Benefits Than are the Members of the Board of Veterans Appeals

This argument is based on a misunderstanding of the two purposes of judicial review. One purpose is to correct an agency when it misinterprets the law. Correcting errors of law plainly works to improve the quality of justice. Independent federal judges have more expertise than members of the BVA in deciding what the law requires.

The second purpose of judicial review is to correct an agency when the agency's decision is contradicted by the overwhelming weight of the evidence. Long ago, courts adopted the rule that they will overrule an agency decision only if the court is sure that no reasonable person would have decided the case the way the agency did. When courts are sure of this, they call the agency decision "arbitrary and capricious." This standard of review is set forth in the Administrative Procedure Act.

This long-standing rule ensures that if court review of VA decisions is allowed, the quality of justice will improve. If the question of whether the VA has properly evaluated the evidence is a close one, the rules of the court require it to defer to the VA's expertise and decide against the veteran. Where the VA's decision is so lacking in support that no reasonable person would agree with it, the court decides in the veteran's favor, correcting an obvious error (see Appendix E).

V. ADDITIONAL COMMENTS

In your letter of invitation, Mr. Chairman, you asked for comment upon the potential benefits and drawbacks of providing for judicial review directly at the U.S. Court of Appeals rather than the U.S. District Courts. We prefer access to the courts at the U.S. District Court level for two basic reasons. The first of these is of significance to the individual veteran considering court review of his claim. There are comparatively few lawyers with the credentials necessary to advocate claims review before the U.S. Courts of Appeals. For the veteran, this is important because it may be difficult to find an attorney locally who could advance the claim in the Appeals Court.

The second reason is a matter of consistency. Claims taken to court from other agencies by other categories of federal beneficiary are all brought before the U.S. District Courts. In any event a claim either denied or allowed by a District Court could always go to the Appeals Court if either the veteran or the VA, respectively, chose to appeal. Taking cases directly to the U.S. Courts of Appeals would constitute an aberration of the judicial branch's long established process.

VI. S. 2292

Mr. Chairman, it is well that the original date of this hearing was postponed. The postponment accommodates the adding of Senator Murkowski's recently introduced bill to the hearing agenda as well as the subsequent Supreme Court decision in McKelvey and Traynor rendering irrelevant the judicial review provisions of S.2292. Although the judicial review provisions of S.2292 are inadequate, there are provisions of this measure that we find to be favorable. With the McKelvey and Traynor decision, judicial review of law and regulation is already a fact.

We wish to stress at this point that S.2292 cannot be allowed to serve as a substitute for S.11. Senator Cranston's bill, in this connection, has been carefully developed over the years as a byproduct of thoughtful consideration of reservations expressed by the other veterans service organizations. To abandon that in favor of adopting a position in support of the existing status quo would be imprudent.

Upon introduction of the Murkowski legislation, we have noted the letters of support from the VFW and the DAV which were inserted into the Congressional Record of April 18, 1988. We welcome the return of these groups, although with some skepticism, to the fold of those once again supporting judicial review. The DAV's letter is particularly heartening since it acknowledges "the admitted deficiencies in the VA's adjudication process (primarily, at the Board of Veterans Appeals)".

At the outset this bill would, for the first time, codify the VA's current voluntary practice of conforming to the Administrative Procedure Act (APA). The VVA has always supported subjecting of the VA to the APA just as we have always supported subjecting VA claims decisions to the same judicial oversight as other agencies of the federal government.

One of the many ways in which the judicial review provisions of S.2292 are inferior to those of S.11 is the courts where these disputes would be decided. As discussed in Section V of this statement, it would be much preferable to bring challenges to regulations to the federal District Courts. The potential difficulty of finding credentialed attorneys in sufficient numbers to bring claims into the Courts of Appeals could disadvantage the veteran. The greater numbers of federal District Courts would also make it more convenient for the veteran to attend the judicial proceedings bearing on his or her claim. The federal judicial system's strength lies in the opportunity for complex legal questions to be thoroughly debated with ultimate Supreme Court resolution.

Assuming that lawyers prepared to practice in the Appeals courts are relatively scarce, the bill's provisions limiting to 60 days the period within which a petition for court review must be filed could seriously jeopardize a veteran's chances of ever actually getting to court. The same 60 day limitation might also be difficult to comply with at the District Courts. At the Appeals courts, however, this provision must be seen as onorous. The bill is silent on the payment of costs which can be substantial in courts that require printed briefs.

The measure's provisions setting out the terms and conditions of amounts that may be paid to attorneys as compensation for representing veterans in their disputes with the BVA or in the courts are mostly unobjectionable. We agree with the provision of S.2292 allowing a mechanism for attorney's fees to be paid by the VA in cases where the VA loses the dispute. However, nowhere in S.2292 is there any provision for the appointment of counsel for indigent veterans where the VA appeals to the Court of Appeals for the Federal Circuit.

Apart from the fee structure for attorneys' fees, the measure strictly limits judicial review to law and regulation. As already stated this limited type of review is already available. In addition to this, the veteran should be allowed access to the courts when the facts of the claim are arbitrarily applied to the governing regulation. We see no good reason why a court should be permitted to find VA regulations unlawful or arbitrary while denying the courts sufficient authority to similarly decide an adverse BVA decision on a claim for benefits.

Amended section 3404(f) of title 38 in section 4 of the bill states that attorneys' fees may only be paid in cases involving claims for benefits under the laws administered by the VA but that these provisions "shall not apply in cases in which the Veterans Administration is the plaintiff or in which other attorneys' fee statutes are applicable." This provision seems a bit ambiguous. In cases where the VA is the plaintiff and the veteran is the defendant, it is unclear whether this provision bars the veteran from securing legal assistance costing more that $10 in preparing for his or her defense. We note that under current interpretations of the law the VA prohibits payment of more than $10 to an attorney, at the administrative stage, where complex legal cases are raised in overpayments cases. This is particularly a problem in some real estate foreclosure based cases.

The measure provides for a more independent BVA and this is a step that is long overdue. Insulating the BVA from rules and controls promulgated by the VA's Central Office has to be seen as a way of ensuring the decisional integrity of the Board. Requiring the Chairman and Vice Chairman of the

Board to be nominated by the President and confirmed by the Senate is also a positive step in assuring the integrity of independent Board decision-making. Limiting the terms of Board members to a finite number of years should permit the Chairman to maintain BVA stability without compromising the opportunity to bring vitality to the Board by appointing members when the terms of inadequate members expire. Fifteen years may be a bit too long a period to set for a single term, however. Finally, we welcome the provision barring the availability of bonuses for Board members. As we have seen in the past, the practice of allocating bonuses has been used to spur production at the expense of thoroughness in adjudication of appellate claims.

VII. CONCLUSION

As American citizens, members of the Vietnam Veterans of America, Inc. believe that military service is an obligation of citizenship. We do not believe that mere veterans' status should be a basis for life long rewards and special treatment. We also believe that there is a corresponding obligation of the nation to provide the programs and services necessary to compensate individuals for service connected injuries and to restore those who served, as nearly as possible, to parity with those who did not serve. That parity, and in many cases even appropriate compensation, cannot be attained without equal access to the American system of justice as envisioned by the founding fathers in setting up the American system of checks and balances.

Mr. Chairman, members of the Committee, that concludes our testimony on the subject of judical review.

FOOTNOTES

[1] Congress has established Boards for Correction of Military Records. 10 U.S.C. § 1552. As the Supreme Court recently stated, these Boards provide a "means with which an aggrieved member of the military 'may correct any military record . . . when [the Secretary of the military department acting through the Board] considers it necessary to correct an error or remove an injustice.'" Chappell v. Wallace, 103 S. Ct. 2362, 2367 (1983). These Boards resolve a wide variety of GI claims, such as promotions, performance evaluations, and fitness determinations. If the GI is unhappy with the Correction Board's decision, the Supreme Court confirmed that these "Board decisions are subject to judicial review and can be set aside if they are arbitrary, capricious, or not based on substantial evidence." Id.

When a GI is convicted of a crime by a court-martial, judicial review is also available. The Uniform Code of Military Justice guarantees military personnel a right to review by a military court, and if the GI is not satisfied with that court's decision, he or she can get the case reviewed by a civilian judge in federal district court.

[2] Oversight Hearing on the Operation of the Board of Veterans Appeals: Hearing Before the Subcommittee on Compensation, Pension, and Insurance of the House Committee on Veterans' Affairs, 99th Cong., 1st Sess. 10-11 (1985) (hereinafter "1985 House Hearings").

[3] Id. at 40 (Statement of Philip R. Wilkerson, Assistant Director for Claims, National Veterans Affairs and Rehabilitation Commission, The American Legion).

[4] Judicial Review of Veterans' Claims: Hearing Before the Subcommittee on Special Investigations of the House Committee on Veterans' Affairs, 96th Cong., 2nd Sess. 295 (1980) (hereinafter "1980 House Hearings") (Statement of Donald H. Schwab, Director, National Legislative Service, Veterans of Foreign Wars of the United States).

[5] Veterans' Administration Adjudication Procedure and Judicial Review Act and the VA's Fiscal Year 1984 Major Construction Project Proposals: Hearing Before the Senate Committee on Veterans' Affairs, 98th Cong., 1st Sess. 315 (1983) (hereinafter "1983 Senate Hearings") (Statement of R. Jack Powell, Executive Director, Paralyzed Veterans of America).

[6] 38 U.S.C. § 4004(c)(1982).

[7] 1983 Senate Hearings at 312.

8/ In his 1983 testimony before a subcommittee of the House Committee on the Judiciary, B. Wayne Vance of the Department of Justice stated:

> The present scheme has two tracks or tiers. First, Congress has established a comprehensive disability retirement system for service members permanently injured in the line of duty. See 10 U.S.C. §§ 1201 and 1401. Moreover, should a service member leave ther service without seeking disability retirement, he or she may later request it. For example, Section 1552 of Title 10, United States Code provides that the Secretary of [a Military Department] acting through the . . . Board for the Correction of Military Records (. . . BCMR), may correct any military record when he considers it necessary to correct an error or remove an injustice . . . If a former service member were to demonstrate to the . . . BCMR that he suffered permanent disability as a result of a service-related injury, the . . . BCMR could recommend that his records be amended to reflect retroactive, permanent disability retirement. Such an amendment would create a right to both back pay and continuing annuity with benefits.
>
> Second, the Veterans Benefits Act provides a similar system of medical care, income and death benefits for the veteran and his family.
>
> Medical Malpractice Claims by Armed Forces Personnel: Hearing Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary, 98th Cong., 1st Sess. 40-41 (1983) (hereinafter "1983 House Hearings - Committee on the Judiciary") (Statement of B. Wayne Vance, Deputy Assistant Attorney General, Civil Division, Department of Justice).

In a 1974 military law review article, Lieutenant Robert H. Wellen, JAGC, USNR, also attested to the similarities of the two systems:

> The amount of disability benefits provided by the military departments depends directly upon the member's base pay at the time of his separation or retirement. The Veterans Administration governs a parallel system of disability benefits, under which the payments are fixed sums based on a degree of disability. Base pay is irrelevant. A service member may not receive both Armed Forces retirement pay and VA compensation, but he may elect the benefit more favorable to him. Disability retirement pay from the Armed Forces and VA compensation, then, are in a sense components of a single program. The service member receives compensation for his disability pay based on pay, but the VA provides minimum compensation for those whose base pay is on the lower

> end of the pay spectrum. The total system provides income protection for those with higher incomes, and a minimum-level stipend for those with low incomes.
>
> R.H. Wellen, *Armed Forces Disability Benefits -- A Lawyer's View,* 17 JAG Journal 1, 13-14 (Spring 1974)(footnotes omitted).

9/ *See Reith v. United States,* 462 F.2d 530, 536 (1972); *Cooper v. United States,* 178 Ct.Cl. 277, 316 (1967).

10/ *Id.*

11/ Wellen, *id.* at 14 (footnote omitted).

12/ *Id.* (footnote omitted).

13/ *See Istivan v. United States* 689 F. 2d 1034, 1037 (1982); *Murson v. United States,* 401 F.2d 184, 187, 192 (1968); *Hutter v. United States,* 345 F.2d. 828 (1965).

14/ *United States v. Brandon,* 584 F. Supp. 803, 807 (W.D.N.C. 1984), *rev'd on other grounds,* 781 F.2d 1051 (4th Circ. 1986).

APPENDIX A
LAWYERS AND THE VA SYSTEM

A. Lawyers Are Presently Within The System

Those who assume that lawyers will harm the veterans benefit system overlook the fact that the VA process is already rife with lawyers -- they're just not there to help veterans. The Board of Veterans Appeals has 189 attorneys as members and staff advisers. Their job descriptions do not provide for assisting veterans develop their cases. The Office of General Counsel, which plays an integral role in promulgating binding opinions of law, has hundreds of lawyers in the Central Office and in the field.

VVA provides lawyer or lawyer supervised counsel in its BVA cases, and Legal Aid/Legal Services have routinely provided lawyers and paralegals to assist veterans benefits claimants. There is no discernable adverse effect to their clients. Additionally, under the pending legislation, lawyers will have little opportunity to affect the VA process. First, the bill mandates that the existing non-adversarial, "benefit of the doubt" system be maintained. Second, attorneys only became involved at the appeals level. Thus, their effect on the regional level, where most cases are resolved, would be minimal. Third, the fee structure is simply not generous enough to prompt heavy attorney involvement except in relatively rare cases where there is the prospect of a very large retroactive award and a high likelihood of success. This would be an unusual scenario since there are relatively few such cases and most are resolved at the regional level before an attorney would become involved.

The Oregon Legislature, seeing lawyers as a positive addition to the system, has appropriated money to hire lawyers to represent veterans in VA claims proceedings, and the Attorney General of the State of Illinois has established a Veterans Advocacy Section.

B. Some Opponents of Judicial Review Do Not Understand the Role of Lawyers in the Administrative Process

The May 15, 1986 outline of the VA General Counsel's position on judicial review essentially capsulizes the notion that the role of lawyers is to somehow increase the complexity of the process:

> The length and formality of personal hearings would increase as more attorneys get involved and as VA is forced to build the record. Hearings may become protracted by extensive briefing, subpoena of treating or consulting physicians, introduction of circumstantial testimony by friends or family members, and more intensive direct- and cross-examination of witnesses.

This position paper does not comment on whether service organizations present such evidence, examine witnesses or brief cases when needed. We assume that they do. The interjection of words like "subpoena", "cross-examination", and "circumstantial" only help to obfuscate the debate by perpetrating negative stereotypes of lawyers. It is well known that the veteran may not subpoena witnesses and no cross-examination is possible. It is not clear why judicial review would lead to more intensive direct examination of one's own witnesses.

C. The Lawyer's Role

VVA sincerely believes that the introduction of lawyers and other legally trained professionals chosen by veterans into the benefit system will not harm the system. There are several specific benefits we feel that legally trained advocates can add to the system. Let it be clear, however, we are not advocating the replacement of service organization service officers with lawyers. We are advocating that veterans receive the benefit of an additional option in complex cases.

The most important function lawyers can serve at the VA, as they have at other federal agencies, is that of mediator between the veterans and the agency. The typical lawyer who advocates before an administrative agency does not fit the stereotypical image of adversarial trial-type litigator, the image created by some who oppose lawyer participation at the VA. Persons familiar with federal agency practice know that the role of an administrative advocate is far different from a courtroom litigator. The administrative lawyer frequently acts to explain a complex agency to a client, attempts to clarify issues for both the client and the agency, and tries to resolve claims with as little acrimony as possible. The reason why lawyers would function this way is obvious. The VA is not an adversary process, and there is no attorney on the other side to argue against.

An even more telling point against the argument that lawyers will somehow infect the system is to look at the BVA itself. As discussed above, the entire decision-making process within the VA is monopolized by attorneys. Everything is done in legalistic terms. To argue that allowing the veteran to have a lawyer will infect the process with legalism ignores the reality of the process as it now exists.

Lawyers have been trained to approach issues in a certain way, and that method is used to adjudicate issues at all federal agencies and in the courts. We have been told that the presentation of briefs to the BVA, which VVA does on almost every case, has helped the members better understand the legal issues and the factual record. Given the incredible caseload at the BVA, clarification of issues will assist the BVA and at the same time give the veteran informed access to the system in complex cases.

There is another result from the introduction of lawyers that will be beneficial to veterans and the agency. It is the benefit of a lawyer advising a client that he or she does not have a meritorious case, and is common to all lawyer-client relationships. We have found that providing a client with frank advice about the chances of success is welcomed by the client who never before knew the real merits of the claim. Lawyers are ethically bound to so advise clients when they see no avenue for success. To do otherwise would deprive the veteran of the opportunity to seek a second opinion from a person or organization who might have a different or more novel approach to such cases. In this way, lawyer participation could significantly reduce the caseload of the agency on grounds that are sound and in a manner that leaves the client with a sense that a full and fair consideration has been given in the case by an independent professional.

D. The Question Of Fees

Another attack on lawyers involves the assumption that most lawyers will seek large fees and that the veteran will always net less than that to which he or she is entitled. Reference is made to the Agent Orange tort litigation and Social Security cases.

The Agent Orange attorneys subsidized in vast amounts the litigation which resulted in $180 million for the veteran class, significantly more than anyone else has obtained for the class. The fact that judge cut the fee request is significant but not necessarily for the reasons cited. The judge's action in reducing the fee awards to less than ten million dollars, 5 1/2 percent of the total award, demonstrates that courts are adept at overseeing fee awards. Similar restrictions are enforced in Social Security cases at all levels.

The May 15 VA General Counsel's Outline states that the liberalization of attorney fees awards in Social Security cases "caused" lawyer representation to increase between 1977 and 1983. The Outline does not mention the rise of free counsel provided by Legal Services attorneys and does not cite the increased success rates obtained by resort to federal courts necessitated by the Social Security Administration's rigid policies such as non-acquiescence to ocurt decisions.

The opponents to judicial review cannot have it both ways. First, they imply that lawyers are only interested in the veteran's money. Second, they insist the courts will be flooded. Third, they argue that the system works so well that judicial review is not needed. If the system works so well and lawyers only want money, then it is unlikely that these "money hungry" lawyers will waste their time in federal court on cases for which they will not be paid.

Arguments pointing to attorney greed are often leveled by referring the fees awarded to attorneys in Social Security benefit cases. However, a March 1987 report on this subject was issued by the Inspector General of the Department of Health and Human Services (HHS) in which the problem rested not with the attorneys but with the Administration Law Judges (ALJ). The report issued dealt with high attorney fees during the internal appeals process of the Social Security Administration (SSA). The report does not only criticize attorneys, but rather criticizes the ALJ's and the current system of setting attorney fees and the ALJ's allowing the attorney fees to get to high.

Under present law, attorney fees are capped in much the same way we are proposing in HR. 639: an agreement between client and attorney, not to exceed 25% of past due benefits and subject to approval of the presiding judge. The problem arises when the 25% of past duw benefits works out to $300 or more per hour. The IG report faults the Administrative Law Judges who rubber stamp the 25% agreement between client and attorney without considering the per hour fee. The report also criticizes the current complex formula that Administrative Law Judges are supposed to use to cap fees. Both the IG report and earlier Social Security Administration reports have concluded that Administrative Law Judges rubber stamp the 25% agreements because the rules for reducing the fee are too complicated.

The IG report recommends a new approach which would maintain the 25% arrangement up to $75 per hour. Allowances could be made for exceptional cases where $75 per hour is not an adequate fee, but the judge would be in a position to consider whether or not to raise the attorney's fee rather than considering whether or not to lower the fee as is currently the case. The IG is convinced this will have a dramatic impact on overpayments to attorneys. The $75 figure was arrived at based on three sources: The Equal Access to Justice Act (EAJA), a paper issued by the Justice Department, and a current piece of legislation entitled The Legal Fees Equity Act (LFEA).

APPENDIX B

POSITION DESCRIPTION FOR ATTORNEY ADVISER (GS-11) FOR THE VETERANS ADMINISTRATION. BOARD OF VETERANS APPEALS, BOARD SECTION, MARCH 2, 1982

I. PRINCIPAL DUTIES AND RESPONSIBILITIES

A. Reviews and evaluates the evidence in claims folders and prepares tentative appellate decisions in written form for consideration of the Board Section. In connection therewith, applies the laws administered by the VA to the facts in the individual cases. Cases are assgned on a selective basis to progressively gain experience in the various kinds of appellate issues.

B. Conducts research on occasion on questions encountered in case review or as requested by the Section. Drafts briefs outlining findings and recommendations as to appropriate action.

C. As assigned, classifies appellate decisions for inclusion in BVA Index I-01-1 and prepares summaries of decisions designated as "select."

II. SUPERVISORY CONTROLS OVER THE POSITION

Serves under the close supervision of the Chief Member, who is responsible for training and control of quality of tentative decisions. The incumbent may obtain the advice of Medical Advisers on medical problems and Senior Attorneys, where indicated, on legal problems arising in the preparation of tentative decisions. In general, however, he/she is expected to utilize initiative and judgment in evaluating the evidence and making findings of fact and conclusions of law in tentative decisions.

III. OTHER SIGNIFICANT FACTS

Must be a member of the bar, in good standing.

POSITION DESCRIPTION FOR ATTORNEY ADVISER (GS-13) FOR THE VETERANS ADMINISTRATION, BOARD OF VETERANS APPEALS, BOARD SECTION, MARCH 11, 1982

I. PRINCIPAL DUTIES AND RESPONSIBILITIES

A. Reviews and evaluates the evidence in claims folders. Applies the laws administered by the Veterans Administration to the facts in the individual case; then, prepares appellate decisions in written form for consideration of a Board Section. Very difficult cases, involving quesitons of law and mixed questions of law and fact are selected for assignment to incumbent. Examples: Cases in which there are multiple questions at issue; new or novel questions for which there are no precedents; claims for entitlement to several benefits; claims to entitlement under a number of different provisions of law; cases involving highly conflicting evidentiary data which must be reconciled; contesting claims from several claimants for the same benefit; and cases vigorously argued by representatives.

B. Conducts research on original and novel questions encountered in case review or as requested by the Section. Drafts briefs outlining findings and recommendations as to appropriate action.

C. Gives advisory opinions orally or in writing on very difficult, complex and controversial problems encountered in appellate review.

D. When so requested by the Chief Member, attends hearings on appeals conducted before the Board in particularly involved cases, for the purpose of assisting the Section members in examining witnesses so as to assure that all relevent evidence is elicited.

E. As assigned, prepared correspondence on the more controversial appellate decisions and problems for the Administrator's and the Chairman's signatures.

F. As assigned, classifies appellate decisions for inclusion in BVA Index I-01-1 and prepares summaries of decisions designated as "select."

II. SUPERVISORY CONTROLS OVER THE POSITION

Serves under the general direction of the Chief Member. In general, is responsible for and is relied upon to prepare decisions in final form for the Board Section's review and consideration, and receives no technical supervision. Utilizes own initiative and judgment in evaluating the evidence, making findings of fact and conclusions of law. May confer with and seek advice on complicated medical or legal problems from medical advisers or Senior Attorneys.

III. OTHER SIGNIFICANT FACTS
Must be a member of the bar, in good standing.

POSITION DESCRIPTION FOR SENIOR ATTORNEY ADVISER (GS-14) FOR THE VETERANS ADMINISTRATION, BOARD OF VETERANS APPEALS, BOARD SECTION, JUNE 10, 1983

I. PRINCIPAL DUTIES AND RESPONSIBILITIES

A. Prepares decisions on extremely complex and controversial appeals involving formal personal hearings held before members of the Board in Central Office and before travel Sections of the Board in the field.

B. Attends formal personal hearings with the members.

C. Conducts pre-hearing meetings and discussions with Members of Congress, attorneys, appellants and service organization representatives to assure due process of law and to expedite the hearing process.

D. Prepares decisions requiring a high order of original and creative endeavor based on extensive research of the most complex legal and medical problems submitted to the Board for final resolution. Obtains and evaluates expert opinions from the Chief Medical Director and independent medical experts associated with leading medical schools.

E. By direction of the Deputy Vice Chairman, formulates legal guidelines for use by other attorney-advisers to achieve uniformity throughout all Sections of the Appellate Group in the disposition of issues on appeal. Participates with medical advisers in the development of medico-legal guidelines.

F. Prepares decisions on cases before the Board through petition for reconsideration, where briefs or hearings to show error in a prior appellate decision have been presented and where the participating Board membership has been increased to six or more for the Administrator's and the Chairman's signatures.

G. Serves as Acting Board Member in the event of vacancy or in the absence of regular members, as designated by the Chairman or Vice Chairman of the Board.

H. Performs special professional assignments from the Chairman, Vice Chairman, Deputy Vice Chairman or Chief Member, to assist in the continued improvement of appellate services.

II. SUPERVISORY CONTROLS OVER THE POSITION

Serves under the direction of the Chief Member of the Board Section., who assigns the duties enumerated above and exercises general administrative supervision.

III. OTHER SIGNIFICANT FACTS

A. Must have broad legal experience in the field of veterans' benefits, preferably with at least 2 years as an attorney-adviser for the appellate agency in the GS-13 level. Must have demonstrated exceptional ability to: timely prepare high quality decisions on extremely complex and controversial appeals involving unusual issues; authoritatively discuss legal and medical principles and evidentiary requirements with outside attorneys, physicians and appellants.

B. Must be a member of the bar, in good standing.

APPENDIX C

The Military's Physical Disability Retirement And Separation Program

Entirely separate from the Veterans' Administration program for service-connected disability benefits, the military departments have a Congressionally authorized physical disability benefit program. Like the VA program, the military departments have established agencies to review a veteran's claim for service-connected disability benefits. Unlike the VA benefit system, however, Congress has authorized court review of military disability benefit program determinations.

Congress has long authorized a system for the military departments to compensate personnel who become disabled during their military service. See 10 U.S.C. §§ 1201, et seq. Basically, if a service member incurs a disability as the proximate result of performing active duty or the disability was incurred in line of duty in time of war or national emergency, and that disability is rated at 30% or more, the service member is entitled to military disability retirement pay.1/ When a service member's disability is apparent during his or her military service, the military departments will refer the member's case to physical evaluation boards to determine whether the person should be retired for physical disability reasons. However, if the member is discharged without the disability having been reviewed by an in-service board, the veteran may still apply for these disability benefits by submitting an application to a Board for Correction of Military Records (BCMR) established pursuant to 10 U.S.C. § 1552. See Dzialo v. United States, 677 F.2d 873, 876 (Ct. Cl. 1982) ("Where a claimant . . . does not know that he is ill or does not appreciate the serious character of his disability until after he has been separated from the military, application to [a Board for Correction of Military Records] becomes the [appropriate] . . . administrative remedy."); Freedman v. United States, 310 F. 2d 381, 392, 402 (Ct. Cl. 1962), cert. denied, sub nom. Lipp v. United States, 373 U.S. 932 (1963).

In order to determine whether a veteran-claimant meets one of the primary criteria for benefits -- whether the disability is 30% or more disabling — the BCMR uses the standard schedule for rating disabilities used by the Veterans Administration for service-connected disability claims. And, just like the VA, in rating disabilities the military departments are required to resolve any reasonable doubt in favor of the claimant. See Rieth v. United States, 462 F. 2d 530, 536 (Ct. Cl. 1972); Cooper v. United States, 178 Ct. Cl. 277, 316 (1967).

Once a final military agency determination on a claim for physical disability retirement pay is rendered, the veteran can seek judicial review in either the United States Claims Court or a United States District Court. The veteran can challenge in court either a denial of disability benefits or a decision to rate a disability that is lower than the veteran believes is appropriate. The standard of review used by the federal courts in such cases is the familiar Administrative Procedure Act standard of whether the

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1/ The rules are more complex than this, but this is a general statement of the eligibility requirements.

agency action is arbitrary or capricious, an abuse of discretion or is unsupported by substantial evidence. See Istivan v. United States, 689 F. 2d 1034, 1037 (Ct. Cl. 1982); Merson v. United States, 401 F. 2d 184, 192 (Ct. Cl. 1968); Hutter v. United States, 345 F. 2d 828 (1965). When courts review agency decisions on military disability benefit claims, there is often in the record a Veterans Administration decision on the degree of disability the veteran is suffering. The courts are not required to accept this VA determination, although they normally defer to the Veterans Administration conclusion unless there is substantial evidence to the contrary. See, e.g., Hutter v. United States, 345 F.2d at 831.

APPENDIX D

U.S. House of Representatives
COMMITTEE ON VETERANS' AFFAIRS
335 CANNON HOUSE OFFICE BUILDING
Washington, DC 20515

July 11, 1986

Mr. Howard J. DeNike
333 Franklin Street
San Francisco, California 94102

Dear Mr. DeNike:

Thank you for writing to express your views on the testimony presented by Mr. Rosenberg to the Committee on June 24. The views of Mr. Rosenberg were of course his own views and were presented as such.

I think that it is to be expected that attorneys will differ in their views of the treatment that they receive before various administrative tribunals. I also believe that Mr. Rosenberg's testimony raised some very serious points that cannot be dismissed simply because the experience of another attorney is not the same. His testimony does point out the danger of comparing systems that have been adopted to meet different ends, and reports his own favorable experience with cases which he takes on a pro bono basis before the Board of Veterans' Appeals. I found his testimony to be helpful in meeting the Committee's objective of fully exploring what might occur if expanded judicial review of veterans claims were permitted.

Sincerely,

G. V. Montgomery
G. V. (SONNY) MONTGOMERY
Chairman

320 Todd Branch Drive
Columbia, S.C. 29223

May 28, 1986

Honorable G.V. Montgomery
Chairman
House Committee on
Veterans Affairs
334 Cannon Office Bldg.
Washington, DC 20515

Dear Chairman Montgomery:

I am writing you to provide information that I think will be useful to your committee in its deliberations on H.R. 585.

Until last year, I served as Executive Secretary of the Air Force Board for Correction of Military Records. I served five years in that capacity. Before that I served eight years as a Senior Examiner to the AFBCMR. I also served in the U.S. Army from 1965-1968 and from 1970 to 1973 as Night Force Supervisor preparing daily news summaries for the President of the United States.

As you know, the Boards for Correction of Military Records (BCMR) consider many military disability retirement cases which are similar in many respects to Veterans Administration service-connected disability compensation claims. The BCMRs also review other types of cases that contain issues similar to VA claims, e.g., line of duty investigations, propriety of character of discharge, etc. Counsel before the BCMRs are by and large service officers of the veterans service organizations and the Red Cross. Veterans also hire attorneys to appear before the BCMRs in the more complex cases. The BCMRs have been subject to judicial review on questions of law and narrow review of questions of fact for at least 40 years.

The BCMRs operate in such a manner as to give the benefit of the doubt to the veteran in all cases. Reconsideration of a previous BCMR denial is generously afforded. Despite the presence of lawyers in complex cases and the availability of court review, the system is non-adversarial.

A relatively small percentage of BCMR decisions are challenged in federal court, and the effect of court review on the operation of the BCMR is on balance positive. Over the years I have had conversations with colleagues from the other BCMRs and my sense is that they share my views. It is also my impression that most service officers of veterans organizations also favor judicial review.

If I can supply further information, do not hesitate to contact me.

Sincerely,

/s/

William T. Randell

cc: Honorable Don Edwards
U.S. House of Representatives
Washington DC 20515

WTR/jme

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MARY BALUSS
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July 18, 1986

Chairman G.V. Montgomery
House Committee on Veterans Affairs
U.S. House of Representatives
Washington, D.C. 20515

Re: *H.R. 585*

Dear Mr. Chairman:

I have recently learned of testimony presented to you by Mr. Keith Rosenberg on the issues of (1) removal of the $10 attorney fee limitation for representation in Veterans Administration (VA) claim and (2) repeal of the restrictions on judicial review of VA determinations. Several aspects of Mr. Rosenberg's testimony concern me.

Mr. Rosenberg told the Committee that it can "rest assured that if judicial review is allowed in Veteran's Administration cases, the technical defenses that have emerged in military pay cases will more than likely be raised in the judicial review of Veterans Administration decisions." Putting aside the question of how the imposition of technical defenses that would affect *some* appeals would be worse for veterans than the complete absence of an appeal right, I must question the factual basis for Mr. Rosenberg's statement. It rests in part on *Matter of VanderMolen*, Decision of Comptroller General B-199060 (1980). Mr. Rosenberg cites *Vandermolen* as authority for the proposition that the "technical defense" of res judicata will creep into veterans appeals. However, Mr. Rosenberg omitted an important fact regarding the VanderMolen appeal. As the attorney who represented Mr. VanderMolen in his suit for reinstatement, I believe the record before you should reflect that Mr. VanderMolen made an express and knowing waiver of all claims in excess of $10,000 in order to invoke the jurisdiction of the United States District Court under 28 U.S.C. §1346(a)(2)(1982). The court recognized his right to make the waiver. When Mr. VanderMolen later sought damages in excess of $10,000, the Comptroller General relied on the waiver rather than a concept of res judicata more generally applicable to BCMR appeals.

There is another, more subjective, aspect of Mr. Rosenberg's testimony, with which I disagree. Mr. Rosenberg asserts that the Boards for Correction of Military Records (BCMR) have become more formal and technicality oriented with the availability of judicial review. Of course, Boards differ as individual experiences differ. However, in my dealings with the AFBCMR, including an appeal completed only last month, I have found a general willingness to look at substance rather than to take advantage of the "technical defense." One can take issue with the outcome of particular appeals without losing an appreciation for the extent to which that Board at least has maintained an informal and accessible atmosphere. I have found the BCMR far easier to deal with than the Veterans Administration.

I hope the Committee will find favorably on the proposed legislation. Based on my observations and experience, veterans are not well-served by the present limitations.

Respectfully submitted,

Mary Baluss

Mary E. Baluss

MEB:pas

APPENDIX E

VA IMMUNITY FROM REVIEW OF FACTS

VVA strongly supports including in S.11 limited review of issues of fact. Instead of the standard provided in section 2046(d) of S.11, we would prefer the traditional and well-known "arbitrary and capricious" standard of review. This standard allows court review of issues of fact only when BVA decisions are clearly unsupported by the evidence of record. Even when the court does review an issue of fact, it is required to remand the case to the BVA for clarification of the BVA's basis for decision. In addition, a limited review of issues of fact will circumvent the oft-litigated question of distinguishing between issues of law and issues of fact.

The standard contained in HR 639 permits federal courts to review narrowly factual determinations of the Board of Veterans Appeals (BVA) and to overturn or remand these determinations only when they are "arbitrary and capricious." This is the common standard used by courts which review agencies under the Administrative Procedures Act. It is more narrow than the review standard under the Social Security Act. In those cases judges determine whether "substantial evidence" supports the Social Security Administration's findings. That test requires more of a weighing of the evidence.

The arbitrary and capricious test does not involve the weighing of evidence. Great deference is given to agency findings, and they are overturned only if the factual conclusion appears to be "without any basis in fact." This very narrow standard of review guards against judges substituting their view of the evidence for that of the agency being reviewed.

The best way to describe what this type of factual review will do is to look at a few general examples. One area of great concern to veterans service officers has been the issue of increased ratings due to unemployability. Normally the veteran's representative provides sworn testimony from the veteran, family, friends, and former employers and medical evidence to demonstrate that the veteran cannot hold a job. In most cases the Board of Veterans Appeals decision finds the veteran "employable" without discussing the facts of record or the medical evidence that supports this conclusion. In such a case, the court would properly remand the case for a factual explanation by the BVA. If the BVA could point to evidence of record to support the original decision, the decision would stand.

Cambridge Survey Research

Fifth Floor 3299 K Street, N.W., Washington, D.C. 20007 Telephone (202) 337-6822

MEMORANDUM

TO: VIETNAM VETERANS OF AMERICA

FROM: CAMBRIDGE SURVEY RESEARCH

RE: NATIONAL SURVEY OF VETERANS

DATE: APRIL 28, 1988

I. EXECUTIVE SUMMARY

There has been some dispute over whether veterans favor or oppose a change in law that would allow them to go beyond the VA's administrative court system to appeal VA decisions. Some veteran's groups have claimed that veterans support the current system because, they argue, this system has served veterans well. Others claim that veterans would prefer to change it since it deprives them of a basic American right--access to the courts.

We attempted to answer this question by asking a nationally representative sample of veterans their opinion on the issue. In this survey we defined "judicial review" for veterans in layman's terms and provided brief arguments for and against the current system. Veterans were then asked to identify whether they favored or opposed the current system.

The following major findings emerged from this study:

1. **When given a choice, veterans prefer to change the current system by a margin of 3 to 1.** A dominant majority of 72% would prefer access to the courts while 22% favor maintaining the current system and 6% are uncertain which option they favor.

2. **Support for this change is strong across all major demographic and attitudinal groups.** There were no significant subgroups whose support level was less than 60%.

3. **There is strong support for this change among veterans of all age groups.** While support is consistent across the spectrum of groups, the intensity of this support varies moderately according to age. Younger veterans (those 50 and under) were the most intensely supportive of change (89% support). The least strongly supportive veterans were those who were retired (66% support) and those over 50 (65% support). Even among the these last groups, however, it should be emphasized that they still support judicial review by a 2 to 1 margin.

The following is the question text and results:

With one exception, Americans have the right to take a government agency to court if they disagree with a decision made by that agency. This right, called the right of "judicial review," is currently denied to veterans in disputes with the Veterans Administration, known as the VA. When veterans disagree with decision of the VA, the VA itself reviews that decision and makes a final judgement which cannot be appealed in court. Some people feel that this denies veterans fair treatment. Others say that the current system has treated veterans fairly. Which of the following statements comes closer to your point of view?

	US Veterans
The current system used by the VA to handle veteran's claims is fair. There is no need to change the system by subjecting the VA to judicial review.	22%
Veterans should have the right to appeal administrative decisions to the courts. The VA should be subject to the same judicial oversight as every other government agency.	72%
Don't Know	6%

III. SUBGROUP ANALYSIS

The following chart profiles the opinion by significant demographic catagories. The percentage size of individual groups as part of the sample is provided in parentheses with each group.

		VA SYSTEM	
	IS FAIR	SHOULD CHANGE	DON'T KNOW
	22%	72%	6%
Sex			
Male (96)	23%	71%	6%
Female (4)	15	85	0
Education			
High School (55)	22	70	8
College (44)	23	74	3
Occupation			
White Collar (31)	18	79	3
Blue Collar (22)	21	71	8
Retired (38)	27	66	7
Other (8)	22	72	6
War Generation			
<50 (30)	9	89	2
50+ (67)	27	65	7
Religion			
Protestant (58)	22	73	5
Catholic (25)	20	70	10
Other (17)	25	71	4
Race			
White (85)	24	70	6
Non-White (15)	12	84	4
Primary Information Source			
Television (52)	19	75	6
Newspapers (30)	22	73	5
Other (18)	32	60	9
Ideology			
Liberal (27)	25	70	4
Moderate/DK (21)	19	73	8
Conservative (52)	22	72	6
Region			
West/Plains (20)	21	75	5
Midwest (25)	19	74	6
South (32)	26	69	5
East (24)	21	70	9

While there is no statistically significant opponent groups given the overall strength of support, there is moderate variation between groups along a spectrum of strength. The following chart rank orders the subgroups according to their level of support.

Strongest Supporters (79% or greater support)	
Under 50 years old (30)	89%
Female (4)	85
Non-White (15)	84
White-Collar (31)	79

Moderately Strong Supporters (69-75% support)	
Television-Primary Source (52)	75%
West/Plains (20)	75
College (44)	74
Midwest (25)	74
Protestant (58)	73
Newspapers-Primary Source (30)	73
Moderate/DK (21)	73
Conservative (52)	72
Other Occupations (8)	72
Blue Collar (22)	71
Male (96)	71
Other Religions (17)	71
High School (55)	70
Catholic (25)	70
White (85)	70
Liberal (27)	70
East (24)	70
South (32)	69

Least Strong Supporters (less than 69% support)	
Retired (38)	66%
Over 50 years old (67)	65

Weakest and Strongest Supporters

An analysis of subgroups reveals that support is most intense among veterans under the age of 50 where the margin of support is nearly 9 to 1 (89% support). Support is also intense among women (85%), non-white veterans (84%) and white-collar workers (79%).

The far majority of the subgroups fall within the middle of the scale and can be classified as strong supporters. These groups include everyone from college educated veterans (74%) to high school graduates (70% support); conservatives (72%) to liberals (70%); midwesterners (74%) to easterners (70%).

On the bottom of this scale, support is generally strong but least intense among the older veterans. Retired veterans support this change (66%) as do those 50 or older (65%).

III. METHODOLOGY

This report covers the findings of telephone interviews with a nationally representative sample of 326 veterans conducted from March 22 through March 29, 1988. The sample was adjusted slightly with regard to race. Interviews for this study were conducted by trained, professional interviewers. Telephone numbers were randomly generated by computer to represent both listed and unlisted telephone households. The sampling error is ± 4.8 for the results of this study's central question.

Vietnam Veterans of America, Inc.
2001 S St., NW
Suite 700
Washington, DC 20009-1125

(202) 332-2700

June 3, 1988

The Honorable Alan Cranston
Chairman
Senate Committee on Veterans Affairs
SR-414 Russell Senate Office Building
Washington, D.C. 20510

Dear Chairman Cranston:

This will respond to the request, on your behalf, of the Committee Chief Counsel and Staff Director for additional comments and suggestions on S.11 and S.2292 legislation, to authorize judicial review of VA adjudications. The request was made at the April 28 Committee hearing and we apologize for the delay in responding. As is apparent from our testimony, Vietnam Veterans of America strongly prefers S.11. There are, however, a few changes that we believe need to be made in S.11, and a few of the provisions of S.2292 ought to be added to S.11.

A. The Scope of Review of BVA Decisions. The most important change that needs to be made to S.11 regards the scope of judicial review of a finding of material fact. As the Judicial Conference representatives testified during the recent hearings, the standard provided in Section 4026(a)(1)(D) of S.11 has never been used by Congress before, and it would be nearly impossible for a claimant to prevail in court under this standard.

The core objective of bills to amend Section 211(a) of Title 38 is to improve the quality of decision-making on claims for veterans benefits. Review of these Executive branch decisions by the independent judicial branch of our government will improve the quality of decision-making in two fundamental ways. First, it will provide an avenue for correction of clearly erroneous BVA decisions. Second, the knowledge that a BVA claimant can potentially seek independent court review of its decisions will serve to make the BVA more careful and improve the quality of its decision-making.

Neither of these objectives will be achieved if the standard of judicial review is so narrow that no claimant will be able to prevail, no matter how arbitrary or capricious the BVA decision may be. The Judicial Conference representatives testified that this is the case with Section 4026(a)(1)(D).

There needs to be a more realistic, but still narrow, scope of review of BVA findings of material fact. This is important because the large majority of disputes between dissatisfied BVA claimants and the BVA center on these findings.

The VVA advocates substitution of an "arbitrary and capricious" standard of review of findings of material fact. The arbitrary and capricious standard provides a narrow scope of review (it is narrower than the scope of review of Social Security decisions), is familiar to the judiciary (and thus will promote uniformity in court review) and will allow correction of clearly erroneous BVA decision-making.

B. The Decisions That Are Subject To Judicial Review. S.11 properly assumes that VA regulations are already subject to court review. This assumption is well-grounded (see McKelvey and Traynor v. Turnage, Nos. 86-622 and 86-737 (U.S., April 20, 1988) and Johnson v. Robison, 415 U.S. 361 (1974).

Although the judicial review provisions of S.2292 merely restate the current case law interpretation of Section 211(a), the availability of court review of VA regulations should be added to S.11 in order to demonstrate Congressional approval of this interpretation. Review should occur initially in U.S. District Court, as it does now and would under S.11. All VA regulations, no matter when promulgated, should be subject to court review. For example, in enacting Public Law 98-542, the Senate specifically indicated that court review is available for the VA regulations that the legislation required the VA to promulgate. S.11 should be amended to indicate approval of the case law allowing court review of previously promulgated regulations.

One aspect of the scope of review of VA regulations specified in S.2292 should also be added to S.11. The requirement that a reviewing court set aside VA regulations "resting upon a policy judgement, reasoning, or factual premise so unacceptable as to render the regulation arbitrary" adds a significant, and we believe salutary, structure to the analytical process the courts currently use in evaluating the validity of VA regulations.

A substantive change needs to be made to the definition of a "claim for benefits" in Section 4025(a)(2) of S.11. It appears to exclude from judicial review decisions on requests from a waiver of an alleged overpayment of VA benefits and on disputes of the existence of a debt to the VA caused by an alleged overpayment. These decisions should expressly be included among those for which judicial review is authorized.

C. Advisory Medical Opinions. Section 107 of S.11 would amend Section 4009 of Title 38 to add a procedure by which a claimant may request an advisory medical opinion in certain circumstances. Section 107 goes on to provide that there is no direct judicial review available of a denial of this request. Section 107 should be clarified to ensure that reviewing courts can validly consider the denial of such a request as part of their determination of whether the ultimate denial of benefits is arbitrary or capricious.

D. The Point In The Administrative Process At Which The $10 Attorney Fee Limitation Is Increased. Section 401 of S.11 would increase the $10 attorney fee limitation only after the BVA first renders a final decision. The claimant should have the choice of hiring an attorney from the inception of a claim. Accordingly, Section 404 should be amended to raise the fee ceiling for any claim resolved at any time.

E. A More Independent Board Of Veterans Appeals. The VVA strongly supports the changes to Section 4001 of Title 38 contained in S.2292. The BVA needs to be made more independent of the Administrator, and these provisions are a step in the right direction. The elimination of discretionary bonuses to BVA members adds a welcome additional measure of independence. Eliminating bonuses helps ensure, for example, that BVA decision-making is not unduly driven by productivity considerations. Making the BVA Chairman and Vice Chairman subject to Presidential appointment and Senate confirmation is also a wise departure from current practice.

As always, your attention to the views of the VVA is appreciated.

Sincerely,

Paul S Egan

Paul S. Egan
Legislative Director

Vietnam Veterans of America, Inc.
2001 S St., NW
Suite 700
Washington, DC 20009-1125

(202) 332-2700

June 28, 1988

Senator Frank H. Murkowski
Ranking Minority Member
Senate Veterans' Affairs Committee
SH-202 Hart Senate Office Building
Washington, DC 20510

Dear Senator Murkowski:

This letter will acknowledge receipt of your June 21, 1988 request for additional information supporting the lawsuit against the VA relative to the Board of Veterans Appeals. I have asked Bart Stichman, our Litigation Director, to discuss this matter with the lead attorney in this matter. The attached letter constitutes the advice of our attorney in the lawsuit and will have to serve as the VVA's response to your additional questions.

Under ordinary circumstances we would welcome the opportunity to answer your additional questions as fully as possible. It is hoped that you understand the current circumstances as unusual and appreciate our inclination to follow the counsel of our attorneys.

Sincerely,

Richard E. O'Dell

Richard E. O'Dell
Vice President

REO/jdw

★ A not-for-profit national veterans' service organization ★

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June 28, 1988

Bart Stichman, Esq.
Director of Litigation
Vietnam Veterans of America
2001 S Street, N.W., Suite 700
Washington, D.C. 20009-1125

Tom
4

Re: Vietnam Veterans of American v. Turnage,
Civil Action No. 88-1218 NHJ

Dear Mr. Stichman:

In our capacity as counsel to the Vietnam Veterans of America ("VVA") in the class action styled Vietnam Veterans of America v. Turnage, which was filed in the U.S. District Court for the District of Columbia on May 5, 1988, you have asked us whether it is advisable for the VVA to disclose to the Senate Committee on Veterans' Affairs facts, beyond those already set forth in the complaint, relating to the allegation that the Board of Veterans Appeals ("BVA") extends special treatment to claimants based on whether certain congressmen or senators express interest in their claims. As we discussed several weeks ago when you first raised this issue, we believe that it would be ill-advised and prejudicial to the VVA's ongoing litigation for the VVA to provide additional information at this time regarding the charges in its complaint.

We believe that premature disclosure of additional facts concerning the challenged BVA practices before the plaintiffs have conducted any formal discovery in the case may prejudice its ability to gather additional evidence to support its claims. If the VVA elects to reveal the evidence collected thus far by its staff and attorneys from various sources, it may have great difficulty obtaining further information from those sources or from other sources who have not yet been contacted. This would obviously harm the VVA and the plaintiff class's ability to successfully prosecute the suit.

It would also be disadvantageous to the VVA's ability to pursue this action for it to release information in its possession concerning the preferential treatment accorded to certain claimants when it has no assurance that the Veterans Administration will turn over information in its possession -- even through formal discovery -- concerning the BVA practice at issue. As you are aware, on June 20, 1988, counsel for the defendants served by mail a motion for a protective order to stay all discovery in the Turnage suit because the Veterans Administration ("VA") plans shortly to move to dismiss the entire suit. Accordingly, the VA has to date refused to respond to any of the discovery requests filed by the VVA and the co-plaintiffs on May 5, 1988. Without any guarantee that the plaintiffs will have the reciprocal opportunity to inquire of the VA concerning the BVA's practice of special treatment for certain claimants, it would be unwise for VVA to release information acquired in its ongoing investigation concerning that practice.[1]

In addition, as you are aware, lawyers associated with a pending civil action are generally prohibited from making extrajudicial statements, beyond quoting from or referring to public records, where they are reasonably likely to be disseminated to the public and might influence the decision of a tribunal. See D.C. Code of Professional Responsibility, DR 7-107(H)(1987); ABA Model Code of Professional Responsibility DR 7-107(G)(1980). Although these ethical limitations do not apply to extrajudicial statements made by the VVA (as opposed to its attorneys), they reinforce our belief that disclosure of additional facts concerning a BVA practice which is the subject of the VVA's complaint is inadvisable.

For these reasons, we conclude that the VVA should not disclose additional information relating to pending litigation at this time.

Sincerely,
Robert H. Loeffler GMS
Robert H. Loeffler

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[1] If the VA could be persuaded to withdraw its motion for a protective order and to respond immediately and fully to the plaintiffs' pending discovery requests, it might be appropriate for the VVA, in turn, to release the additional information sought by the Senate Committee.

Statement of
John F. Heilman
National Legislative Director
Disabled American Veterans
Before the
Committee on Veterans' Affairs
United States Senate
April 28, 1988

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

On behalf of the more than 1.1 million members of the Disabled American Veterans (DAV) and its Ladies Auxiliary, we are grateful for the opportunity to appear before you today to present its views on judicial review of decisions by the Veterans' Administration (VA) and the related issue of attorneys' fees for services rendered to VA claimants. A table of contents of our statement is attached hereto as Exhibit A.

DAV -- indeed, the veterans' community as a whole -- has been called on to consider these issues over a long period of time. We are pleased that S. 2292 was introduced last week and is now before the Committee. Although we continue to oppose S. 11 as we have consistently, since the onset of these deliberations, opposed judicial review in federal district court and an increase in fees payable for representation before the VA on individual claims, we fully support S. 2292 and request the Committee to report it favorably.

DAV believes that S. 2292 offers an approach highly preferable to S. 11 (and to its companion bill in the House of Representatives, H.R. 639), one that is genuinely capable of being enacted by the Congress and signed into law by the President. Such an outcome would free Members of the Congress and the veterans' community of their long-standing efforts to resolve this matter and release those energies for return to the substantive work of delivering services and benefits to veterans, their dependents and survivors.

I. Basic Considerations Affecting the Need for Reform

Before specifically addressing why S. 2292 is acceptable to DAV and S. 11 is not, we think it is important to set forth our understanding of six broadly applicable elements of the judicial-review debate that have been, in our view, either inappropriately ignored, inaccurately portrayed or newly arisen.

(1) Veterans' Service Organizations (VSOs). One essential aspect of the work of VSOs has not received the attention we believe it should have been given in determining the extent to which court involvement is necessary in the conduct of national veterans' affairs.

In addition to the assistance provided to individual VA claimants free of charge by VSO service representatives, the

VSOs operate highly effective legislative programs which need not be detailed before this Committee. Suffice it to say that in their recent commentary on the pending proposal to elevate the VA to Cabinet-level status, editorials in newspapers from dozens of cities throughout the United States have observed, as did the Gary, Indiana Post-Tribune: "Some of the country's most effective lobbying is done by the American Legion, Veterans of Foreign Wars, Disabled American Veterans and other groups."

In an article published last summer in the National Law Journal and attached to this statement as Exhibit B, DAV tried to show that this uniquely influential role the VSOs play in the legislative process reflects the very "quasi-governmental" function under the Constitution that they were chartered by Congress to perform. That function is to serve as a check and balance, a function traditionally performed by courts (as they insure executive adherence to Congressional mandates) and Congress (which provides its own oversight of executive conduct).

To the extent VSOs share in this governmental function of the branches -- and DAV believes it is part of its organizational purposes to do so -- VSOs reduce the need for the branches, in this case the judicial branch, to engage in such functions themselves. The attached article refers to the Supreme Court decision in Garcia v. San Antonio Metro. In that case, the majority noted that where interests (there, those of the States) find alternate protection in the legislative process, judicial involvement "disserves principles of democratic self-governance, and it breeds inconsistency precisely because it is divorced from those principles." In our opinion, the quasi-governmental activities of VSOs likewise diminish the need for judicial review. DAV's support for the bills now pending in Congress that would provide compensation for Agent Orange and atomic veterans illustrate VSO performance of this remedial check-and-balance function.

(2) Due Process "Rights". The charge that veterans are denied due process rights (or its common restatement, "fundamental fairness") because of the limits on judicial review and attorneys' fees in Title 38 has permeated discussion of the issues before this Committee. DAV believes those claims are unfounded in some respects and exaggerated in others, to the detriment of responsible public debate.

As to the question of judicial review, VA decisions of any sort that arguably violate a constitutional right are currently subject to review in the courts and have been for the almost fifteen years since the Supreme Court's decision in Johnson v. Robison. Judicial review of agency action for other kinds of alleged legal error -- the subject of this hearing -- is not, so far as we can determine, a right guaranteed by the Due Process Clause. Instead, the existence and degree of such jurisdiction for the federal courts is a matter of policy for the Congress to decide.

Despite what to us seems a rather clear rule, the present limitation on judicial review of VA decisions is routinely criticized as denying due process to VA claimants. The only possible basis for such a claim seems to rest on the view that the Board of Veterans Appeals (BVA) is so tied to the VA that it is not the kind of impartial decisionmaker required to satisfy the procedural due process requirement for an adequate hearing. Even assuming this is so -- and we think it is at best a close question whether such BVA characteristics as the compensation and removal schemes for its members render the Board unconstitutionally partial -- the most obvious cure for the defect is to restructure the BVA. Certainly an expansion of judicial review is not a constitutionally mandated remedy for perceived BVA deficiencies, as proponents of expansion frequently argue.

As to the question of the fee limit, the Supreme Court decided three years ago, in Walters v. NARS, that with respect to the overwhelming preponderance of VA claims, the $10 cap did not violate due process of law for purposes of equitable relief. It was left open for further judicial proceedings to decide whether the fee limit was constitutional as applied to only a few thousand VA claimants out of the many millions of them. Even assuming the cap is held invalid as to this extremely small percentage of agency claimants -- and we believe that, if necessary, the Supreme Court will ultimately find that the constitutional rights of atomic veterans were not violated by their practical inability to hire lawyers -- it is still misleading, to our way of thinking, to cast a blanket charge of due process violation at the entire fee limit when the constitutionality of only a small aspect of it remains in any serious doubt.

As just demonstrated, it appears to us that the flickering embers of constitutional uncertainty about the limits on judicial review and attorneys' fees in Title 38 have been widely portrayed as roaring fires by some advocates. It is one thing for zealous lawyers, serving the interests of their clients, to make such assertions in traditional legal forums where the decisionmakers have the ability to discern whatever fire truly exists behind the familiar smoke of advocacy. It is another thing entirely for public debate affecting tens of millions of lay Americans to be infected with what we believe are exaggerated claims of unfairness on the part of a government agency responsible to care for them, claims that unjustifiably lead people to believe that there is a wholesale violation of their "civil rights" being carried out by official authority.

(3) Comparisons with Other Agencies. Another pervasive aspect of the public discussion on these issues is the recurring effort to persuade veterans that they are treated differently from all others who deal with the federal government and that this different treatment works to their disadvantage. There is, in our view, both an inaccuracy as to the former and an omission as to the latter that perpetuates important misconception in the affected community.

The inaccuracy concerns the claim that virtually no other person in America (other than veterans) faces similar limits on judicial review and attorneys' fees. Often cited for sympathetic comparison are the opportunities possessed by convicted felons and undocumented aliens to challenge adverse action in court and hire lawyers to mount the challenges. The inaccuracy was illustrated in the first column of DAV's article attached as Exhibit B, where we made reference to claims brought under the Federal Employees Compensation Act (FECA). We understand that annual FECA benefits approximate $1 billion and that annual FECA claims approximate 150,000. This is hardly an insignificant system -- yet it is one as to which judicial review is denied to claimants. And there are more than eighty (80) federal statutes that similarly preclude judicial review in other contexts.

So in fact, the VA statutory scheme is comparable to many others, some quite substantial. But even if it were not, there are aspects of the VA benefit system that make it truly unique -- and make comparisons to other systems like comparing apples and oranges.

Two fundamental distinctions spring immediately to mind. The first is the unique and official pro-claimant bias that underlies all VA claims activity because of the earned nature of the services and benefits provided to veterans. This indeed makes the VA system the reverse of those systems faced by undocumented aliens and convicted felons, whose status or conduct statutorily requires government to institute adverse action against them. Indeed, even where adverse action is not required, in systems like those administered by the Department of Health and Human Services, adversarial proceedings are called for and natural headwinds exist therein for claimants.

Obviously, where the power of the State is arrayed against the individual or even where there is built-in resistance to those affected by agency action, procedural safeguards -- including judicial review and the availability of paid counsel -- are erected to minimize injustice. Absent inherent reason to believe the likelihood of injustice is high enough to warrant such safeguards, however, an affirmative case beyond compelling anecdotes needs to be made to insure that the benefits achieved by erecting them will outweigh their costs to an otherwise favorable status quo.

A second distinction relates back to our earlier comments about VSOs. Again, even assuming the Title 38 procedural limitations are unique, another reason justifying their cost-saving retention are the two equally unique safeguards VSOs themselves provide. One is the free and effective representational service most VSOs provide to all claimants, whether they are VSO members or not. Regarding the invalidity of comparison on the attorneys' fee issue, few undocumented aliens or convicted felons can lay claim to such assistance. On the judicial-review issue, the invalidity of comparison is particularly true with respect to the legislative (or check-and-balance) function of VSOs, because that function is enhanced by the fact that hundreds of Members of Congress share the status of those who VSOs support. By contrast, no Members of Congress are undocumented aliens or convicted felons. In any event, the circumstances of the groups to whom reference is often made are unlikely to provoke vicarious support comparable to that for people who have served the country in uniform.

(4) Modern Legal Environment. When the legal system of the United States was established, it borrowed the common law of England and it is basically the common-law system in which lawyers are trained by American law schools today. As is frustratingly familiar to nonlawyers, the ancient traditions of the common law come laden with hoary Latin maxims like *ubi jus, ibi remedium* (where there is right, there is remedy). Of course, to the common (and American) lawyer, remedy means court and that means the adversarial process between opposing counsel.

It is therefore not surprising -- wholly apart from the lure of $15 billion in annual benefit payments -- that lawyers and some of their institutions, like the American Bar Association (ABA) and the National Association of Attorneys General (NAAG), would support an expansion of courts and lawyers into the VA benefit system. But the ABA's position goes back 30 years and therefore could likely benefit from a critical updating; and the more recent NAAG position was sponsored by the Illinois Attorney General, NAAG's official liaison to the ABA's governing body, the House of Delegates. The resolution he submitted was apparently adopted last December without the presentation of opposing views, so DAV has submitted a response to NAAG's resolution with the request that it be circulated to all State Attorneys General for their reconsideration of the resolution. DAV's response is attached to this statement as Exhibit C, without the article mentioned in the response because that article is already attached as Exhibit B.

Moreover, not all lawyers and legal institutions react with such intuitive recoil to the limitations on judicial review and attorneys' fees contained in Title 38. For example, as spelled out in Exhibit C, the Administrative Conference of the United States (ACUS) and some of its most authoritative members rejected a recommendation to lift those limits made by an ACUS consultant who has also been the designated witness for the ABA in support of that same recommendation before the Congress. The Judicial Conference of the United States has, along with ACUS, also opposed reforms of the current system offered in the past, as have distinguished legal scholars like Yale law professor Mashaw and practitioners experienced in the field like Washington, D.C. attorney Rosenberg, who submitted statements today.

In DAV's view, the reasons behind a growing appreciation for the current VA system of adjudicating benefit claims is the parallel awakening of the American legal profession to the modern conditions of dispute resolution and the recognition that we need better alternatives to the rather inflexible common law traditions we inherited 200 years ago. As first pointed out in the opening paragraph of DAV's article at Exhibit B, the VA system represents a creative alternative to systems of justice like that which has triggered the medical malpractice crisis. They are clogged with the litigation explosion that began decades ago and the contentiousness of competing lawyers for whom sometimes, in the manner of the Daumier lithograph, the outcome is subordinated to the competition.

(5) Absence of Cost-Benefit Analysis. Perhaps the single most disturbing element of the judicial-review debate

to DAV is the lack of any reliable assessment of the nature and degree of the problems that need correction, the effectiveness of remedies suggested to solve those problems and the various costs that will be incurred by adoption of any particular solution. We can all point to specific circumstances uncovered by those seeking evidence to support one position or another, but the reliability of the information and its selective rather than balanced nature necessarily leaves one to speculate about the true scope of its implications.

As an example, it is often heard from critics of the current system, usually lawyers, that the VA claims process is procedurally if not substantively complex, and that claimants should be able to hire lawyers to run those traps. It is the rare lawyer who will describe any process as simple. After all, perpetuating the mystique of complexity advances the utility of legal assistance.

But even assuming that some VA claims are harder to present successfully than others, is the remedy sought -- the freedom to hire lawyers to present them -- likely to cure the problem? Professor Mashaw's statement to this Committee persuasively suggests the contrary: economic incentives may well result in lawyers creaming off the easy cases (where lawyers are not needed) because contingent fees are more likely to be realized, and declining to work on the hard ones (precisely why the fee-limit reform is sought) because obtaining payment would be less likely. So the benefit side of the analysis, at least as to this commonly argued point, raises doubts about both the extent of the problem and the efficacy of the remedy.

The cost side of the analysis is one about which we have special concerns, because often critics of the system will assume sufficient problems to warrant reform or, even without such assumption, seek to shift the burden to those opposing change, which logically seems to us to reverse the normal burden of proof in such matters. This reversal of the logical order of things is made politically possible by what we have tried to show earlier are unjustifiably categoric assaults on the system of the "Mom and Apple Pie" variety. Rhetorical references to due process violations (denials of civil rights) and procedurally favoring murderers over veterans (no one is treated worse than you), however unfounded they may be, make obtaining a sympathetic hearing for objective consideration of costs difficult, at least in some quarters, because of the inflammatory effect of the exaggerated charges. Who would care about the technicalities of costs when fundamental American values are said to be at stake?

But the costs, we believe, will be real and dear if courts and lawyers are brought too far into the current VA system. To us, "too far" means opportunities, indeed inducements, for paid lawyers to develop extensive records on the facts and circumstances specific to each claimant that will be subject to review in court.

The nature of the changes such reform would bring about seems clear. First, the VA claims environment would subtly but profoundly be transformed as the procedural guile of lawyers begins to load up agency records with standardized documentation designed for court review. Delays will ensue and as cases flow into the courts, producing further delay, the Justice Department will convey to agency managers who will convey to agency adjudicators how they need to improve the government's side of these cases. Adjudicators, previously inclined by agency policy to generosity toward claimants, will be less so inclined (even if that generosity is made more formal in law) as they face, not only claimant but also counsel and/or management pressure to respond effectively to artful lawyers' tactics designed to create reversible error in anticipation of suing the VA.

Of course, the nature of error alleged to a court based on the facts specific to a particular claimant would not be confined to the agency's view of those facts alone. It would also include what the lawyers call mixed questions of law and fact, particularly the application of a law or regulation to the facts of that individual claim. A court customarily answers such questions by asking whether the application was "arbitrary and capricious." The relatively subjective nature of such determinations is well-known, making dubious the proposition that an inexperienced tribunal (a court) will make them better than one with expertise (the VA, including the BVA).

The changed complexion of VA decisionmaking will be implicitly, if not explicitly, apparent to agency claimants. As the Supreme Court predicted in Walters v. NARS, the introduction of lawyers focused on building reversible error into each record will change short proceedings into protracted controversies and make claimants believe attorneys are necessary to cope with the very adversarialness and complexity created by the introduction of lawyers -- the classic bootstrap.

Particular costs stemming from this predictable phenomenon are several. First, agency and court delays will mount in cases for both compensation and injunctive relief. (The injunctive relief sought in the NARS case over five years ago is still being sought.) Fees for lawyers will be diverted from claimants, unnecessarily if the creaming described earlier takes place. Administrative costs for increased burdens of agency adjudication and litigation may well create pressures to find offsets in the budget for VA benefits. Agency adjudicators newly stimulated to adversarial behavior in individual claims may in close cases be less, rather than more, likely to favor claimants. Disabled veterans benefited by the self-help mechanisms of VSOs will become more dependent on a community of professionals driven by other interests, with a possible loss of self-esteem that cannot be ignored. The relationship President Lincoln envisioned between government and those who served it will become, not nurturing and fraternal, but more like that between parties to an arms-length contract. DAV believes the Congress should look long and hard before it acts to risk such adverse consequences.

(6) New Developments. Certain developments in veterans' affairs have occurred so recently that their significance to the issues now before this Committee have not had much of an opportunity to percolate in the debate. Two such occurrences are so central to this hearing that discussion of them is unavoidable.

First is last week's decision by the Supreme Court in the case of Traynor v. Turnage, involving the application of the VA's willful misconduct rule to claimants who were considered primary alcoholics. In that case, the Supreme Court decided that challenges to the VA rule based upon its alleged inconsistency with the Rehabilitation Act were not precluded from judicial review by 38 U.S.C. § 211(a).

We read the latter aspect of the Traynor decision as having limited effect. Section 211(a) bars from judicial review VA decisions made "under any law administered by the [VA]." The Supreme Court held that § 211(a) did not bar from judicial review a challenge to a VA decision (the willful misconduct rule) under the Rehabilitation Act because that Act is administered by the Department of Justice, not the VA, and is therefore not covered by the terms of § 211(a). Accordingly, challenges to VA rules for inconsistency with Title 38, for example, remain barred from court because Title 38 is a "law administered by the [VA]." The reform proposed by S. 2292, introduced two days before Traynor was decided, would allow judicial review for these and other types of challenges not addressed by the Supreme Court's decision, leaving the vitality of the bill essentially unimpaired.

The second recent development, emerging only within the last six months, is the prospect for the VA's elevation to Cabinet-level status. As pointed out in the conclusion of DAV's article at Exhibit B, such problems as do exist in the VA system for adjudicating benefit claims can most cost-effectively be addressed by adhering to a standard of excellence achieved through good government and good management. The opportunities presented for improvement in the administration of veterans' affairs if Cabinet status is secured, which would likely include the recruitment of fresh talent and an infusion of innovative techniques, are manifest. Such a salutary development would be complemented by innovations instituted by VSOs such as DAV's new million-dollar, computer-assisted training program for all its service officers, the nationwide implementation of which began last fall. Working side-by-side in this fashion, the public and private sectors can surely make a difference that would inspire public confidence.

II. Specific Reasons for Supporting S. 2292

The basic considerations set forth above lay the groundwork for our comments in support of S. 2292 and in opposition to S. 11. For efficiency of expression, we will incorporate by reference those prior considerations that apply to our comments below, which will be divided into four parts.

(1) Judicial Review of Rules. DAV believes that VA rules -- including, in appropriate circumstances, the rulemaking process -- should be subject to judicial review. In part to insure that the agency has the first opportunity to correct its errors before burdening the federal courts, we support granting to the BVA authority over VA rules.

Customary standards for reviewing the substantive validity of rules -- whether they violate the Constitution, are inconsistent with statutory authority or are grounded in articulable forms of arbitrariness -- should be applicable. The U.S. Courts of Appeals, which are familiar with petitions for review of rules, should be the initial forum for judicial review. Because objections to rules may not be apparent or have meaning until the rules are encountered in the context of a claim, challenges to rules arising out of that context should also be allowed.

DAV's support for this expansion of judicial review rests on the belief that challenges to rules engage courts and lawyers in their quintessential function of resolving legal questions, and maximize cost effectiveness by insuring the validity of VA policy choices affecting large numbers of agency claimants without incurring the high costs and marginal benefits of judicial review of facts specific to individual benefit determinations. Consistent with this rationale, only "facial" challenges to rules, not "as applied" challenges arising out of the adjudication of an individual claim, could be heard by a court.

Finally, the provisions of the Rating Schedule should be excepted from the foregoing because of the uniquely discretionary decisions involved in its formulation and the unique expertise required to exercise such discretion. In addition, the decisions embodied in the Rating Schedule are so many and diverse that the high cost of permitting judicial review of its provisions, and the marginal gain possible from judicial decisions, would be akin to that of allowing individual benefit determinations to be reviewed. Congress's delegation to the VA in this regard should be complete and final.

As may be apparent, S. 2292 accomplishes all the foregoing and the bill remains necessary because of the limited effect of the Traynor decision, described earlier. By contrast, it does not appear that Title II of S. 11, making applicable to the VA the informal rulemaking provisions of the Administrative Procedure Act (APA), would even authorize judicial review of VA rules since the APA itself is not jurisdictional. Moreover, even if it did, the provisions of the Rating Schedule would not be excepted by S. 11. Accordingly, DAV supports S. 2292 because it permits judicial review of VA rules with a needed exception, and opposes S. 11 because it does not authorize such review or, if it does, would do so without that necessary exception.

(2) Judicial Review of Facts. As stated above, the only issue arising out of an individual claim as to which S. 2292 would authorize judicial review is the facial validity of a VA rule, an authorization supported by DAV. On the other hand, S. 11 would allow judicial review of two kinds of issues involving the facts specific to an individual claim which, in combination with the compensated opportunity S. 11 would offer to attorneys to develop those fact issues, would impose the unjustified costs on the VA benefit system that we discussed earlier, creating a further basis for our opposition to S. 11.

The fact issue explicitly exposed to judicial review in S. 11 is that governed by the "manifest injustice" standard that S. 11 would make applicable to VA fact findings. However narrow that standard is perceived to be, it seems to us naive to believe that creative lawyers would not see that opportunity as tempting as Fuller Brush salesmen once saw a crack in the door. Coupled with the 15 pages of bill provisions in Title I of S. 11 that would statutorily establish a complicated array of VA adjudication procedures to facilitate the building of a fact record, we could reasonably anticipate lawyers and/or insistent claimants seeking unforeseen avenues of judicial redress. Indeed, it would not be surprising to find unrepresented VA claimants themselves seeking judicial relief in a manner not dissimilar to the many habeas corpus petitions now filed _pro se_ in all U.S. District Courts.

In addition to S. 11's at least superficially narrow opportunity to seek judicial review of VA fact findings, S. 11 would also authorize courts to set aside VA "decisions" for being "arbitrary, capricious [or] an abuse of discretion" -- implicitly leaving the door wide open for VA claimants to take to court virtually any case on its facts. The theory would be that the VA erred in applying a law or regulation to the particular facts of a claimant's case, presenting for court determination under that subjective standard the kind of mixed question of law and fact that we earlier suggested is more appropriate for the agency to make in any event.

The opportunity S. 11 presents for formal, adversarial adjudication within the VA by compensated counsel seeking to create reversible error in a record ultimately subject to judicial review on facts specific to a particular claim is precisely the threat to the current VA benefit system to which DAV remains strongly opposed.

(3) Attorneys' Fees. When a claimant has a claim before the VA governed by a rule (s)he believes to be invalid, DAV believes that claimant should be able to retain counsel to make the challenge meaningful by employing legal assistance to perform its core function. The widespread benefit to many claimants of insuring proper VA policy decisions fully justifies making reasonable attorneys' fees available both before the BVA and in court. Such provision is authorized by S. 2292, and we support it.

By contrast, S. 11 makes reasonable attorneys' fees available at any time after the BVA's first decision, and for any purpose. Accordingly, for example, attorneys could be compensated for assisting a claimant in the reopening of a BVA-denied claim before the VA rating board, with the full panoply of S. 11's adjudication procedures available to manipulate the development of the record. We use the word manipulate advisedly, for as the Supreme Court approvingly quoted Chief Judge Friendly in Walters v. NARS, "causing delay and sowing confusion not only are [a lawyer's] right but may be his duty."

Again the fatal combination is present in S. 11 and not in S. 2292: compensation is made available for attorneys to employ formal and complicated adversarial procedures within the VA adjudication system to artfully develop individual records that can be relied upon to argue reversible error before a court on a question of fact or a mixed question of fact and law. The profound costs to veterans' affairs made possible by such change is a risk that DAV believes should not be assumed.

(4) Board of Veterans Appeals. As with authorization of judicial review of VA rules, S. 11 is silent on reform of the BVA, while S. 2292 makes significant changes in the Board's structure. With respect to the Board's authority over VA regulations, it should not extend to the Rating Schedule, to be consistent with S. 2292's limitation on judicial review of VA rules. Moreover, concerning the VA's authority to challenge in court a Board determination of invalidity, a mechanism should be devised for defense of the Board action on review should the successful claimant before the Board be unable to appear.

Apart from these inconsequential observations, S. 2292 again offers important, not to say needed, improvement for the VA benefit system fully compatible, in our view, with elevating the VA to Cabinet-level status. We addressed earlier questions raised about the constitutional adequacy of the Board's independence. To the extent these questions present legitimate concerns, DAV believes the reforms proposed by S. 2292 should more than put them to rest, and should be enacted.

Summary

The changes embodied in S. 2292 -- allowing full judicial review of VA rules and reasonable compensation for attorneys before the VA and courts to assist claimants in challenging those rules, while restructuring the BVA to make its stature and independence unquestionable -- are genuine reforms offering significant improvement in the VA benefit system for all veterans.

DAV believes these changes, especially in combination with the fresh breeze that will undoubtedly sweep through the agency if it is added to the President's Cabinet as expected, fully meet the concerns raised about the adequacy of the system's performance, and the perceptions of that adequacy. As DAV's training program for claims representatives has become the envy of all in the veterans' community concerned about service, so can a Department of Veterans' Affairs revamp a benefit system to embody alternate means of dispute resolution worthy of emulation by the national community concerned about the excessive costs of courts and lawyers.

The changes sought by S. 2292 would achieve balanced reform without creating the jeopardy of both substantially likely and currently unforeseeable costs posed by the very different changes embodied in S. 11, and should thus present sound prospects for passage by the Congress and signature by the President. To break the deadlock that has marked these issues for over a decade and bring meaningful assistance to the veterans' community, we urge this Committee to favorably report S. 2292 to the full Senate, and appreciate the opportunity to offer these views.

Ex. A:	Table of Contents
Ex. B:	DAV article in National Law Journal
Ex. C:	DAV response to National Association of Attorneys General

Exhibit A

Table of Contents

Statement of
John F. Heilman
National Legislative Director
Disabled American Veterans
Before the
Committee on Veterans' Affairs
United States Senate
April 28, 1988

Page

Introduction 1

I. Basic Considerations Affecting the Need for Reform . . 2

- (1) Veterans' Service Organizations (VSOs) 2
- (2) Due Process "Rights" 4
- (3) Comparisons with Other Agencies 7
- (4) Modern Legal Environment 10
- (5) Absence of Cost-Benefit Analysis 12
- (6) New Developments 17

II. Specific Reasons for Supporting S. 2292 19

- (1) Judicial Review of Rules 20
- (2) Judicial Review of Facts 22
- (3) Attorneys' Fees 24
- (4) Board of Veterans Appeals (BVA) 25

Summary 26

Monday, August 17, 1987 THE NATIONAL LAW JOURNAL 9

Exhibit B

Vets Are Helped

THE MEDIA recently have given an unusual amount of attention to some critics, basically lawyers, who have attacked the system by which the Veterans' Administration administers benefit claims. The criticism stems from disappointed claimants' limited access to courts and lawyers. The public treatment of this issue has thus far misapprehended, at best, the value of the quasi-governmental function performed by the many private, non-profit veterans' service organizations (VSOs), which provide an effective claimant remedy well-suited to a bar in search of creative alternatives to litigation.

The VA was formed pursuant to an executive order signed by President Hoover in 1930 and assumed the function, among others, of adjudicating claims for benefits. The preclusion of most VA benefit decisions from judicial review was made express in the Economy Act of 1933. Between the end of World War I in 1918 and the end of President Franklin D. Roosevelt's first term in 1936, Congress also chartered the three largest and best-known of the VSOs: the Disabled American Veterans (DAV), the Veterans of Foreign Wars and the American Legion. By statute, the VA must "recognize" the VSOs to permit them to perform their principal service: the representation of VA claims. Since 1862, no one has been permitted to charge more than a maximum fee (today, $10) to represent a VA claimant. These non-profit organizations represent members and nonmembers alike at no cost.

The lawyer-critics generally seem to believe that there is something inherently wrong with the VA system because it limits the role of courts and lawyers, ignoring other systems that are not subject to judicial review such as that administered under the Federal Employees Compensation Act, which annually dispenses over $1 billion. That view should surprise no one. Lawyers are trained in the common law tradition under hoary maxims like ubi jus, ibi remedium (where there is right, there is remedy), and courts have been the invariable common law means by which such remedies have been provided.

But the old English system of justice that we inherited never had to contend with a community of over 28 million veterans served by nearly a quarter of a million federal agency employees who annually process six million claims and dispense $15 billion in benefits. In modern American society, where alternate means of dispute resolution are the touchstone of an enlightened bar, we should welcome and encourage the unique advantages of the current VA benefit system.

The lawyer-critics want courts to ensure that the VA properly administers the statutorily based VA benefit scheme. But under the current system, many hundreds of professional non-lawyers employed by the VSOs provide free representation to VA claimants and can prevent or at least identify from their everyday representation before the VA recurring deficiencies in the agency's fidelity to congressional directives themselves.

ITS KEY elements having been established contemporaneously with the federal agencies created during the New Deal, the VA system was part of the modern administrative state studied by the attorney general before the enactment of the Administrative Procedure Act. By 1940, experience led the Attorney General's Committee on Administrative Procedure to conclude that the VSOs are quick to correct through legislative action both "common question[s]" underlying VA claim denials and "vagaries of policy" they detect at broader levels. In fact, the committee thought that the effective legislative attention commanded by powerful VSO memberships would be "dominant if ever there were to be a head-on collision between them and the (VA)."

By contrast, the judicial review sought by the lawyer-critics on questions of individual benefit determinations is unlikely to provide more relief than is available through the independent review provided by the Board of Veterans Appeals (BVA), where lawyers fare no better than VSO non-lawyers. And both such review mechanisms must stay within the bounds of already enacted law.

Examples of the current system's responsive flexibility abound. No one can deny the pervasive public sentiment that finally has developed in favor of Vietnam veterans. It has led to, among other things, legislation authorizing the national memorial, readjustment counseling centers for post-traumatic stress disorder, and Agent Orange study and treatment. These belated achievements reflect a sympathetic climate that will be sustained in the years to come. For veterans of an earlier era, legislation to provide significant relief for atomic radiation claimants, now pending and likely to be enacted, also is illustrative.

The corrective oversight role played by

Continued on page 22

Mr. Zengerle, a partner in the Washington, D.C., office of Boston-based Bingham, Dana & Gould, is counsel for DAV. Mr. Joeckel, a combat-disabled Vietnam veteran, is the executive director of DAV, which has a nationwide membership of more than 1 million disabled veterans.

BY JOSEPH C. ZENGERLE
AND CHARLES E. JOECKEL, JR.

VA System Should Limit Lawyer, Court Roles

Continued from page 9

VSOs is thus comparable to the judicial check on executive action, and indeed produces greater uniformity and greater electoral influence over agency decisions. Effective political influence before the Congress, not legal advocacy before the courts that would largely duplicate the work of the BVA, is the better way to resolve the mass-justice issues presented in the adjudication of VA benefit claims.

As the Supreme Court determined in 1984 in *Garcia v. San Antonio Metro*, even with respect to constitutional issues, judicial review should be minimized when the interests of aggrieved parties are safeguarded by significant legislative influence (in *Garcia*, the direct and indirect influence of the states in the Congress). When Congress authorizes a VA benefit scheme and charters VSOs explicitly to perform a quasi-governmental function in the administration of that scheme, conditions similar to those in *Garcia* exist that more than justify the Congress' minimization of judicial review.

WHAT THE current system also provides is a sense in every veteran of personal influence based solely upon his or her service in uniform, a sense that increases with the degree of a veteran's service-connected disability and participation in VSO activities. That influence further provides a tangible demonstration of how our government democratically fulfills its obligations to citizens who have honored their duty to serve.

The introduction of more courts and lawyers into the system would dilute the self-esteem derived from the operation of the current system by veterans qua veterans and, as the Supreme Court just held in *U.S. v. Johnson* with respect to suits under the Federal Tort Claims Act, "undermine the commitment" to national service that the VA was established to foster. After all, constitutional claims such as those presented in the pending challenge to the statutory fee limit, and challenges to VA rules such as that involving alcoholism now pending in the Supreme Court, already are permissibly litigated. More litigation would add little, if any, overall improvement to the VA's administration of congressionally authorized entitlements.

Finally, the diversion of judicial, agency and claimant resources to support the more formalized adversarial system that lawyers' involvement would inevitably bring has not been shown to be justified in any reliable cost-benefit analysis. For example, a VA inspector general report recently disclosed to Congress revealed that about $170 of $180 million in benefit errors favored VA claimants.

> We are convinced that good management and good government can realize the potential value of this unique VA adjudicatory system while preserving its special features — and limiting the role of lawyers.

The economic reallocations brought about by the unavoidable consequences of providing more courts and lawyers, such as removal of the fee limit, are particularly important to consider. VA benefits are capped; unlike the tort system, in which a severed limb can lead to a multimillion-dollar recovery, no veteran, however disabled by war, ever can become a millionaire on VA benefits. Particularly, in an era of restrictive budget deficits, there is little room to compensate for reallocations to attorneys' fees and the like.

The National Law Journal's cover story on June 15 gave full-throated voice to 10 loosely allied lawyer-critics. It quoted but to only one lawyer-proponent of the VA system (the agency's general counsel). An academic critic warning of a "scandal of Iran-Contra proportions" buried in the VA was cited, disregarding Yale's William Nelson Cromwell professor of law, Jerry L. Mashaw, who eloquently defended the current VA system in testimony before Congress just last year. Practicing lawyers calling most of their attorney-colleagues "burgeois stooges" ascribed multiple references in the article to their allegations of the incompetence by VSO representatives.

AS FOR DAV, we would be remiss in not bringing to your attention a few facts about the only malpractice action pending against any of DAV's 200 non-lawyer officers, but one that you unfairly chose to feature on your front page. Although any comment we might make about the merits of the case could be seen as self-serving, we point out the procedural matter that the complaint was filed in state court nearly two years ago, shortly after which plaintiff's counsel withdrew without substitution. It never has been served on DAV or otherwise prosecuted since then, and appears to have been abandoned.

We seek to start the process of bringing some balance to an important public debate that has to date been substantially one-sided. We do not defend all the practices and decisions of the current system. As Justice Sandra Day O'Connor observed recently in *Bowen v. Yuckert*, 55 U.S.L.W. 4735 (June 8), with respect to the Social Security system: "Perfection in processing millions of . . . claims annually is impossible." But the solution to imperfection is not to add courts and lawyers when the rest of society is finding that approach less and less satisfactory.

The answer is for the leaders of the Congress, the VA and the VSOs to insist on a standard of excellence for the benefit of the nation's veterans. We are convinced that good management and good government can realize the potential value of this unique adjudicatory system while preserving its special features — a challenge that can excite the imagination of all those devoted to the rewards of public service.

Exhibit C

DAV Response
to
Illinois Attorney General
on
Judicial Review of VA Decisions

March 14, 1988

On January 26, 1988, the Illinois Attorney General (AG) wrote the Disabled American Veterans (DAV) about his veterans' affairs program and related action taken by the National Association of Attorneys General (NAAG) in a recent resolution.

The AG announced that the "top priority" of his state office for 1988 is passage of federal legislation that would expand the opportunity for judicial review of decisions made by the Veterans' Administration (VA) and that at his urging, "the chief legal officers of every single state in the Union believe this now should be passed."

The AG's references to the preclusion of judicial review in 38 U.S.C. § 211(a) as a "terrible injustice" and to the related $10 limit in 38 U.S.C. § 3404(c) on fees that may be charged by representatives of VA claimants as "absolutely absurd" suggest that he may not be fully aware of the substantial -- and in our view better -- arguments establishing the value of those two federal statutory provisions. While there appears to be no transcript available of the proceedings in which NAAG adopted the resolution to which the AG refers, it seems likely that the "chief legal officers of every single state" are even less aware than he may be of arguments supporting those statutes.

Because the AG and NAAG have a better appreciation than most of the critical need to hear both sides of an issue to insure informed decision-making, it seems useful for DAV to provide them with a glimpse of the other side, however belated and abbreviated the offering may be.

Our experience particularly leads us to emphasize the essential role played in veterans' affairs by veterans' service organizations (VSOs), whose memberships exceed six million American veterans and who employ many hundreds of full-time professional representatives to assist VA claimants without charge. The AG's letter to us and its enclosed personal biography, press release about the NAAG resolution on judicial review and brochure about the veterans advocacy division of his office make no mention of the VSOs.

All of the major VSOs, including DAV, oppose the reform that the AG and NAAG support. It should not be surprising to discover that in an era that includes such phenomena as the malpractice insurance crisis, courts and lawyers are not uniformly viewed as a panacea.

Attached for reference is an article published in the National Law Journal last summer that helps explain the special role VSOs play in veterans' affairs, which includes their unique legislative influence to justify the minimum involvement of courts and lawyers. As a liberal majority of the U.S. Supreme Court recently observed, where interests are well-protected in the legislative process, judicial involvement "disserves principles of democratic self-governance, and it breeds inconsistency precisely because it is divorced from those principles." Garcia v. San Antonio Metro, 469 U.S. 528, 547 (1985).

Nearly a decade ago, the Administrative Conference of the United States (ACUS) was similarly presented with a recommendation to expand judicial review of VA decisions. In a rare move, the ACUS plenary session rejected the recommendation, despite the (short-lived) lack of opposition from the VA. Speaking successfully against expansion of judicial review were such eminent legal authorities in administrative law as Kenneth Culp Davis, professor (now-emeritus) of the Chicago Law School; Judge Harold Leventhal (now-deceased) of the U.S. Court of Appeals for the D.C. Circuit; and Professor (now-Justice) Antonin Scalia.

More recently, Judge J. Skelly Wright of the U.S. Court of Appeals for the D.C. Circuit, the nation's premier tribunal of administrative law apart from the U.S. Supreme Court, has written: "The most obvious case for judicial retreat is when courts are reviewing administrative action by government agencies and departments for nonconstitutional error." Wright, Judicial Review and the Equal Protection Clause, 15 Harv. C.R.-C.L. L. Rev. 1, 4 (1980) (emphasis added).

Even more recently, and in direct opposition to the AG's own testimony before the House Veterans' Affairs Committee supporting expanded judicial review of VA decisions, Jerry L. Mashaw, the William Nelson Cromwell professor of law at Yale, testified __against__ the measure and observed that "the costs [of such an expansion] rather clearly outweigh the benefits. And I believe that most of the costs will be paid by veterans themselves." Hearings on H.R. 585 before the House Comm. on Veterans' Affairs, 99th Cong., 2d Sess. 142 (1986) (House Hearings). The Illinois Department of Veterans' Affairs, the official arm of the Governor's office on such matters, also opposed the judicial-review measure supported by the State's AG. __Id__. at 39 (Statement of Cong. Rowland).

The AG's 1986 Congressional testimony, referred to above, provides a further indication that the VSO role in the VA benefit system is not fully understood. Referring to disappointed VA claimants, the AG stated that "there is nothing we can do or recommend under the present law," asserting that veterans are not protected by a "system of checks and balances." __Id__. at 33, 35.

In contrast to this testimony, as the attached article notes, the U.S. Attorney General, in studying the VA preparatory to Congress's consideration of the Administrative Procedure Act, long ago confirmed the function of the VSOs to correct through legislation flaws they detect in the VA's decisions and policies. The attached article describes the corrective oversight role played by VSOs as "comparable to the judicial check on executive action [producing] greater uniformity and greater electoral influence over agency decisions."

Furthermore, the comparison the AG's testimony made with respect to the availability of judicial review for VA claimants, on the one hand, and convicted murderers, on the other, is not apt precisely because of the uniqueness of the unmentioned VSO role. Murderers, illegal aliens and others to whom judicial review is available simply do not have powerful organizations effectively arguing their cause before the Congress and the agency, nor Members of Congress who share and therefore appreciate their status and needs, nor an agency that is designed to give them the benefit of the doubt with respect to their claims. See, __e.g__., 38 CFR § 3.102

As to the $10 fee limit in 38 U.S.C. § 3404(c), also referred to in the AG's letter, when a U.S. District Court preliminarily enjoined enforcement of that statute because the District Court shared the AG's dim view of it, the U.S. Supreme Court reversed, believing that the District Court's assessment of the statute's due process validity had gone "seriously awry." __Walters v. NARS__, 473 U.S. 305, 320 (1985). And in the AG's testimony relying on two sympathetic cases of frustrated VA claimants to support an expansion of judicial review, there is the same "anecdotal evidence" that the Supreme Court found inadequate to support any conclusion about a system that adjudicates many hundreds of thousands of claims annually. Id. at 324 n.11.

The due process issue addressed in Walters suggests a final point we should make. In testifying that the VA is "excluded from due process," House Hearings at 35, and that 38 U.S.C. § 211(a) constitutes a "denial of a basic American right," House Hearings at 150, the AG seems to be arguing that 38 U.S.C. § 211(a) violates veterans' due process rights as was (unsuccessfully) alleged in Walters with respect to 38 U.S.C. § 3404(c).

In this regard, the AG is in error. There is no "due process right" to judicial review of VA claims for nonconstitutional error. Indeed, there is arguably no due process right to judicial review of VA claims even for constitutional error. But we need not quibble over the latter point, for the U.S. Supreme Court has already interpreted 38 U.S.C. § 211(a) to permit judicial review of VA claims for constitutional error in order to avoid such a due process issue. Johnson v. Robison, 415 U.S. 361 (1974).

Whatever questions remain about Section 211(a)'s preclusion of judicial review, they are not of a due process or other constitutional nature, but merely matters of prudent policy. This paper and the attached article are an effort to set forth some of the important prudential reasons for preserving the current system.

By providing the foregoing information, it is our hope to make the AG and NAAG aware that there is more than one side to an issue the resolution of which appears to have been treated as a foregone conclusion. Perhaps further, it may cause a reconsideration of the continuing viability, content or implementation of NAAG's judicial-review resolution, and a corresponding adjustment thereof.

The DAV would be willing to meet with any interested parties to discuss these issues further and hereby solicits the expression of any so interested.

Attach.

BINGHAM, DANA & GOULD

Statement of Joseph C. Zengerle
Counsel for the Disabled American Veterans
Before the Senate Committee on Veterans' Affairs
April 28, 1988

The personal testimony I delivered before the Democratic National Platform Committee in May, 1984, supported an expansion of judicial review of Veterans' Administration (VA) decisions as would have been provided by the only legislation on the subject then receiving serious Senate consideration, and also cited the support of the Disabled American Veterans (DAV) for judicial-review reform. The position of DAV before this Committee, concerning which we are currently representing the organization, similarly supports an expansion of judicial review as would be provided by now-pending S. 2292.

In 1984, I testified in part that VA decisions should be placed on the same footing as decisions related to claimant disabilities made by the Social Security Administration (SSA) and the Boards for Correction of Military Records (BCMR). Since then, Judge Breyer of the U.S. Court of Appeals for the First Circuit, in testimony supporting S. 2292 before this Committee on behalf of the Judicial Conference, observed that fact review of SSA decisions in Article III courts would procedurally be "extremely undesirable" for claimants because of years-long delays and stated as to the merits: "I don't think we do a very good job on these cases." Likewise, Washington, D.C. attorney Rosenberg, who practices before the BCMR, also testified before this Committee in support of S. 2292 and demonstrated that fact review in Article III courts encourages the Boards' creation of technical defenses that bar relief to claimants who present otherwise "substantially meritorious cases."

S. 2292 would provide for review of all VA decisions of fact or law before a restructured Board of Veterans Appeals (BVA) that would be the functional equivalent of an Article I court and review of the validity of all VA regulations before the BVA and Article III Courts of Appeals. This would represent a meaningful expansion of independent review of VA decisions without the anti-claimant costs that have been shown to be incurred by subjecting, for example, all SSA and BCMR decisions to fact review in federal District Courts.

Especially in conjunction with the likely elevation of the VA to Cabinet-level status that would facilitate innovative management reforms, but even standing on its own, DAV believes that a cost-benefit analysis argues strongly for the adoption of S. 2292 as the best means to address both substantive and perceived concerns in the veterans community about the VA claims adjudication process.

VETERANS OF FOREIGN WARS OF THE UNITED STATES

OFFICE OF THE DIRECTOR

STATEMENT OF

JAMES N. MAGILL, DIRECTOR
NATIONAL LEGISLATIVE SERVICE
VETERANS OF FOREIGN WARS OF THE UNITED STATES

BEFORE THE

COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES SENATE

WITH RESPECT TO

LEGISLATION PROVIDING FOR THE
VETERANS ADMINISTRATION'S ADJUDICATION PROCEDURE AND JUDICIAL REVIEW

WASHINGTON, D. C. APRIL 28, 1988

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

Thank you for the opportunity to present the views of the Veterans of Foreign Wars of the United States with respect to S. 11 and S. 2292, bills introduced respectively by Senators Alan Cranston and Frank Murkowski, which provide for judicial review of the Veterans Administration.

The subject of judicial review of veterans claims has been before the Congress for many years. Since the 94th Congress, proposals have been introduced to afford veterans the right to judicial review of VA decisions. As the second largest client agency in the Federal Government, the VA is one of the few agencies whose decisions are final with no further recourse available to their claimants. We support judicial review as mandated by our current resolution. However, this support should not be viewed as our being critical of the VA's claims processing apparatus, including the Board of Veterans Appeals (BVA); we have praised its performance in the past and do not see any reason to alter this support.

★ WASHINGTON OFFICE ★
VFW MEMORIAL BUILDING ● 200 MARYLAND AVENUE, N.E. ● WASHINGTON, D. C. 20002 - 5799 ● AREA CODE 202-543-2239

The Board of Veterans Appeals, under constant pressure for improved timeliness in processing cases and the increasing complexity of its cases (such as radiation and herbicide exposure claims), renders for the most part fair and equitable decisions. However, human nature being what it is, errors in judgment may occur. For this reason, the VFW believes that veterans should be allowed to utilize the court system when certain actions warrant it.

In 1981, the National Commander-in-Chief of the Veterans of Foreign Wars appointed a special committee to study and evaluate the question of judicial review. As a result of this extensive undertaking, the Veterans of Foreign Wars has adopted a position of supporting judicial review of Veterans Administration's benefit determinations in instances only concerning questions of law and regulation. The voting delegates to our most recent National Convention have reaffirmed that position by approving Resolution No. 613 entitled "Judicial Review", a copy of which is appended to my statement for your consideration. The VFW believes this narrowly drawn resolution would adequately permit dissatisfied claimants to seek relief in the appropriate court upon exhaustion of their administrative appeals, meaning no lawsuit could be initiated until after a final decision has been rendered by the Board of Veterans Appeals.

By limiting judicial review to questions of law and regulation, we believe a flooding of cases to the Federal courts would be avoided and, at the same time, the informal flexible review procedure currently in place within the VA would be preserved. It should be noted that the court is not required to hear all cases presented to it. If the petition to the court is not based on a question of law or regulation, then the court would refuse to hear the case and the Veterans Administration's decision would stand. We believe this would also eliminate the possibility for de novo review of claims which would encourage an ever-increasing number of law suits which would have very little likelihood of reversal by the court.

Mr. Chairman, since the VFW is mandated by resolution to support judicial review only in cases concerning questions of law and regulation, we cannot support S. 11 in its present form. S. 11 goes well beyond our mandate in that it includes judicial review of questions of fact in individual benefit determinations which we believe lends itself to de novo reviews. We believe court review is not needed on alleged errors of fact. Again, the Board of Veterans Appeals is a highly competent body and if errors of fact are alleged on appeal, the claim is remanded for clarification. If error is discovered in the appeal decision, the Board will accept the case for reconsideration. Thus, with respect to errors of fact, the claimant does get his day in court.

On the otherhand, Mr. Chairman, S. 2292 more closely adheres to the mandates of our current resolution. As called for in VFW Resolution No. 613, Senator Murkowski's bill provides for judicial review of law and regulation and would not allow a challenge to a VA decision involving a question of fact. S. 2292 would also give much more independence to the VA's Board of Veterans Appeals, an action which we believe will alleviate apprehension among some veterans when having their cases presented to the BVA. Of course, as with most pieces of legislation, we do have some areas of concern with S. 2292. However, these areas of concern are not unsurmountable and we believe can be resolved.

With respect to attorney's fees at the administrative decision making level, the VFW, at this time, does not have a resolution specifically addressing this issue. At our most recent National Convention, the voting delegates were presented a resolution providing for the repeal of the $10 attorney-fee limitation and subsequently failed to adopt such resolution. We anticipate this issue again will be presented to the voting delegates of our up coming National Convention and trust a more favorable outcome will be attained. However, as mandated in VFW Resolution No. 613, we can support a reasonable attorney-fee schedule at the judicial review level.

We also have concerns with S. 2292 providing for an attorney fee not to exceed 25% of past due benefits awarded on the basis of a claim if such an agreement was made between the claimant and attorney. In some cases, when a considerable length of time has elapsed in resolving a disagreement and the specific monetary award is substantial, the fee due the attorney may be considered unreasonable.

In your letter of invitation, you also asked us to address the issue of providing for judicial review at the U.S Court of Appeals or the U.S. District Court. The VFW believes veterans would be better served if they petitioned directly to the U.S. Court of Appeals. Today, the U.S. District Courts are overburdened and taxed to the extreme in rendering decisions in a reasonable length of time. It is our understanding, over 6,000 social security cases alone are presented to the U.S. District Court each year. We believe veterans would be delayed an inordinate amount of time if they were to go to the U S. District Court.

Mr. Chairman, this concludes my statement. Once again, the VFW wishes to thank you for holding this hearing. As indicated, we believe S. 2292 best fulfills the requirements of our resolution and we further believe it would satisfy most members of the Congress; but, what is most important would best serve the veteran.

Resolution No. 613

JUDICIAL REVIEW

WHEREAS, Section 211(a), Title 38, United States Code, provides that decisions of the Administrator of Veterans Affairs on any question of fact or law under any statute administered by the Veterans Administration which provides benefits for veterans, their dependents and survivors are final and conclusive and not reviewable by any other official or court of the United States; and

WHEREAS, this provision effectively denies veterans and their beneficiaries the same rights to judicial review possessed by individuals in pursuit of entitlements under programs administered by other federal agencies; and

WHEREAS, the Veterans of Foreign Wars of the United States has traditionally supported judicial review with respect to questions of law and regulation; and

WHEREAS, the Congress has conducted numerous hearings to ascertain the position of the many involved parties concerning whether, and to what extent, there should be judicial review of Veterans Administration's decisions; and

WHEREAS, this issue has caused much controversy, raising many varied and diverse positions among veterans and the veterans service organizations concerning whether, and to what extent, judicial review should be implemented; and

WHEREAS, a complete and thorough examination of the present Veterans Administration's appeals process appears to be necessary to establish whether, and to what extent and manner, judicial review should be implemented; and

WHEREAS, the Veterans of Foreign Wars of the United States, recognizing its responsibility to the veterans of this great nation and their dependents, while further recognizing the significance and possible impact of the introduction of judicial review, must continue to urge Congress to continue to examine this seemingly apparent inequity in the VA's appeals process; and

WHEREAS, judicial review would require a schedule of attorney fees in addition to and notwithstanding the existing attorney fee limitation under section 3404(c), Title 38, United States Code or any schedule established by Congress at the administrative adjudicatory level; now, therefore

BE IT RESOLVED, by the 88th National Convention of the Veterans of Foreign Wars of the United States, that we reiterate our support for judicial review of questions of law and regulation and support a complete, thorough and impartial third-party study of the current Veterans Administration's appeals process to determine once and for all whether, and to what extent and manner, judicial review of the Board of Veterans Appeals' decision should be permitted; and

BE IT FURTHER RESOLVED, that any attorney fee schedule associated with judicial review be separate and apart from attorney fees provisions applicable to the VA's administrative process.

Adopted by the 88th National Convention of the Veterans of Foreign Wars of the United States, held in New Orleans, Louisiana, August 14-21, 1987.

PREPARED STATEMENT

OF

HONORABLE MORRIS S. ARNOLD

and

HONORABLE STEPHEN G. BREYER

ON BEHALF OF
THE JUDICIAL CONFERENCE OF THE UNITED STATES

BEFORE THE

COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES SENATE

ON

S. 11 - VETERANS' ADMINISTRATION
ADJUDICATION PROCEDURE AND
JUDICIAL REVIEW ACT

and

S. 2292 - VETERANS' JUDICIAL REVIEW ACT

APRIL 28, 1988

Mr. Chairman and Members of the Committee, I am Judge Morris S. Arnold of the United States District Court for the Western District of Arkansas. I appear before you today in my capacity as a member of the Committee on Federal-State Jurisdiction of the Judicial Conference of the United States. I am accompanied today by Judge Stephen G. Breyer of the United States Court of Appeals for the First Circuit and Judicial Conference representative to the Administrative Conference of the United States. Judge Breyer formerly served as Special Counsel of the Senate Judiciary Subcommittee on Administrative Practice and as Chief Counsel of the Senate Judiciary Committee. He also was a professor at Harvard Law School, spending 3 years as a professor at the Kennedy School of Government. Judge Breyer has also written extensively in the field of Administrative Law. Judge Breyer and I are accompanied by Christy Massie, Counsel to the Legislative and Public Affairs Office of the Administrative Office of the United States Courts. We appreciate the opportunity to appear before the Committee on Veterans Affairs to present the views of the Judicial Conference of the United States on S. 11, which provides, among other things, for judicial review of veterans' claims for benefits and S. 2292, which provides for judicial review in the United States Courts of Appeals of Veterans' Administration regulations and regulatory processes only.

The Judicial Conference opposes Judicial branch review of veterans' claims for benefits as contained in S. 11. If

Congress deems review of veterans' claims to be absolutely necessary, then we suggest that such review remain with the Board of Veterans Appeals or be conferred upon a new Article I Executive Branch court. Judicial review should be limited to the review of constitutional issues and statutory interpretations, as is contemplated in S. 2292. Appellate-type review could be had either in the district court on the limited basis of reviewing the record, as is done in Social Security cases, or in the court of appeals, as contained in S. 2292. The Judicial Conference will oppose any provision requiring judicial review of any factual determination of the Veterans Administration.

Most often, requests for comments on legislation affecting the federal courts are made by the House and Senate Judiciary Committees, which have principal legislative and oversight authority for the Judicial Branch of government. Those Committees are familiar with the role of the Judicial Conference within the Judicial Branch of government. I note that four members of this Committee are also on the Senate Judiciary Committee (Senators DeConcini, Simpson, Thurmond and Specter) and that one member of this Committee is a former United States district judge (Senator Mitchell). However, since this committee seldom deals with judicial matters, perhaps a brief explanation of the role of the Judicial Conference is in order.

The Judicial Conference of the United States

Under section 331 of Title 28, United States Code, the Judicial Conference of the United States is the policy-making body for the administration of the United States Courts. While the structure of the federal courts is well-known -- the district (trial) courts, the courts of appeals, and the Supreme Court of the United States -- the structural arrangement for the administration of the Judicial Branch is not so familiar. The Judicial Conference, chaired by the Chief Justice of the United States, is composed of the chief judges of the circuit courts of appeals and one district judge from each of the regional circuits. In addition, the chief judges of the Court of Appeals for the Federal Circuit and the Court of International Trade are also members. Accordingly, the Conference is composed of twenty-six judges from around the country, who represent each level of the Judicial Branch. As members of the Judicial Conference, they serve as administrators and formulators of policy, not as members of a judicial tribunal. The Judicial Conference establishes administrative policy for the court system and makes recommendations to Congress concerning changes in law that impact upon the judiciary's ability to serve the public efficiently and economically.

The Judicial Conference utilizes a committee structure, not unlike that of Congress, to consider administrative problems and policies and to evaluate legislation in response to Congressional requests. Both the present membership of the Conference and the present committee structure are presented in Appendix A to this statement. The Conference considers numerous legislative proposals each year and recommends what the members believe to be the best approaches to be taken with regard to organization, jurisdiction, procedure and administration of the federal judiciary.

Judicial Review of Veterans' Claims for Benefits

The Judicial Conference anticipates that the one central problem for the Judicial Branch in the immediate years ahead will be an exhaustion of our ability to rearrange or reprogram available resources to keep pace with increasing Judicial Branch responsibilities. The Judicial Branch is already experiencing steady growth and sequential change as a direct consequence of both increasing demands for judicial service and legislative actions. Some of the legislation was designed to help us, but some was enacted without recognition of the consequences -- such as the ever-increasing authorization of judicial review without reference to any uniform policy as to type of cases reviewed. Such is the case with judicial review of administrative actions.

Judicial review of administrative actions has been addressed by Congress in reaction to a specific problem in a particular agency on a case-by-case basis in many different committees. The result has been a patchwork of different approaches to the same problem: How best to provide government-administered benefits for those eligible with protections against arbitrary administrative actions. Levels of review range from internal review within the agency to seven levels of review in social security cases: (1) to the supervisor, if the intake officer refuses to review; (2) to an administrative law judge; (3) to the Social Security Board of Appeals; (4) to the United States district court for the attention of a United States magistrate; (5) to a United States district judge for the review of the magistrate's disposition; (6) to a United States court of appeals; (7) to the United States Supreme Court. Perhaps a better approach might be to place such proposals before the respective Judiciary Committees in order to formulate a uniform policy of judicial review for all administrative actions. I understand that the Senate Judiciary Subcommittee on Courts and Administrative Practice has expressed some concern in this area, especially in relation to creation of a corps of administrative law judges.

The specific question of vesting jurisdiction in the United States courts for reviewing cases involving the provision of veterans' benefits has been discussed for many years by the Judicial Conference. Throughout the discussion, the answer consistently given the question has been in the negative. Many, including the Veterans Administration, have argued that to provide an adversarial method of decision-making beyond the Board of Veterans Appeals would drive a wedge between the Veterans Administration and the men and women they serve. This may or may not be so. I will defer to more qualified opinions on that matter. The concerns of the Judicial Conference are limited to the administration of the adversary process under the Constitution and statutes of the United States. Our business is case-by-case adjudication of individual rights, not the routine internal administration of agencies of the Executive Branch of government. We firmly believe that internal policy matters concerning Executive Branch administration are not within the province of the Judiciary.

Our first concern is, of course, limited to whether the federal court system can effectively handle the caseload that would be created by S. 11, which is currently before this Committee. Litigation has become not only frustrating, but expensive and frequently unrewarding. Thus the question becomes, to what avail is it to expand judicial review to government-administered benefit programs when the expense and delay involved effectively prohibit the needy from obtaining relief? Judicial review in such a case would favor only the wealthiest and most aggressive of those seeking benefits.

Twenty-five years ago, in 1963, the Judicial Conference initially disapproved of legislation to provide for the judicial review of decisions of the Administrator in relation to veterans' claims for benefits by the United States District Courts. The Conference then recommended that this review be vested in a special Executive Branch tribunal. Conf. Rept. March, 1963, p. 18. This position was reaffirmed by the Conference in 1978. Conf. Rept. March, 1978, p. 9. Constantly increasing caseloads in district courts, and our belief that it was not practical or desirable to impose additional case filings of veterans' appeals upon district courts reaffirmed our position that the ultimate review of veterans' claims should remain exclusively with the Board of Veterans Appeals or be conferred upon a new Executive Branch Article I court. Conf. Rept. September, 1981, p. 65 and September, 1982, p. 65. In addition, the Conference noted that imposition of such a caseload on district courts would inevitably have a consequential impact upon the courts of appeals and, ultimately, upon the Supreme Court.

A pattern of consistently increasing judicial workloads during the past twenty years has continually required the Judicial Conference to rearrange or reprogram resources in order to respond to demands for basic services. Delays in the creation of needed authorized judgeships and in the filling of vacancies in currently authorized judgeships, and a series of meritorious new demands upon managerial procedures, such as Speedy Trial Act, Pretrial Service Act and Sentencing Reform Act requirements, have aggravated existing systemic congestion. In addition, since 1984, Congress has strengthened law enforcement efforts at the Federal level with, among others, the enactment of the Comprehensive Crime Control Act, including Sentencing Reform, and the Anti-Drug Abuse Act. While new judgeships, the filling of vacancies and larger appropriations, even if timely provided, would not have solved all resulting problems, the delays in availability of new judgeships and appropriations to fund needed supporting personnel have continually kept the Judiciary in the posture of "racing to catch up" with demands for services.

At this point I should note that increases in the size of the federal judicial system have not necessarily paralleled increased workloads in the courts. Every two years the Judicial Conference surveys the need for additional district and circuit judgeships based on the current workload of the courts and corresponding manpower needs. In response to our biennial surveys of 1980 and 1982, Congress in July of 1984 enacted the Bankruptcy Amendments and Federal Judgeship

Act of 1984 (P. L. 98-353), which authorized 85 new federal judgeships to address our 1980 needs.

After passage of the Act -- and taking into account the 85 new judgeships authorized in the Bankruptcy Amendments and Federal Judgeships Act of 1984 -- the Judiciary conducted the 1984 biennial survey. As a result, at its September meeting 1984, the Judicial Conference recommended 5 additional circuit judgeships, 26 permanent district judgeships and 16 temporary district judgeships based on the 1984 workload of the courts and the corresponding manpower needs. In 1986 the Judiciary conducted another biennial survey. As a result, at its September meeting in 1986, the Judicial Conference recommended 13 additional circuit court judgeships, 40 permanent district judgeships and 16 temporary judgeships based on the 1986 workload of the courts. Our 1984 and 1986 judgeship needs have yet to be addressed by Congress. The Judiciary is currently conducting the 1988 biennial survey; and, therefore, this year our judgeship needs will lag eight years behind our workload requirements. This is, of course, aggravated by a substantial number of judicial vacancies which have yet to be filled.

The documented "litigation explosion" in federal trial courts, with its derivative impact upon the Courts of Appeals and the Supreme Court of the United States, has been expensive. In 1966 the Federal Judicial Budget was $80.5

million; in 1986, it was $1 billion and in 1988, it is $1.3 billion. We have requested a supplemental for 1988 of $56.7 million and a fiscal year appropriation for 1989 of $1.7 billion. If the amounts requested for the 1988 supplemental and for fiscal year 1989 are not approved, we estimate that we will have no choice but to:

- Defer the completion of bankruptcy judges' facilities which will reduce the efficiency of the courts to handle the significant increases in bankruptcy case filings.
- Defer the appointment of new magistrates and conversion of part-time magistrates to full-time status, as authorized by the Judicial Conference, which will add to the growing pending caseload in the Federal courts.
- Reduce staffing level in the clerks' offices of the courts of appeals, district courts and bankruptcy courts to 86 percent of the formula allowance established by the Judicial Conference. This staffing level will require reducing the number of hours per day the public and Bar will have access to the clerks' offices.
- Reduce staffing level for probation and pretrial services to 78 percent of the formula

allowance, which will result in curtailment in the supervision of probationers and parolees and limit pretrial services to only serious felony cases. The impact is greatly exacerbated by the additional duties imposed on probation officers as a result of the new sentencing guidelines effective November 1, 1987.

- Be unable to appoint counsel in approximately 9,800 public defender cases. This may lead to litigation regarding Constitutional issues.
- Defer civil jury trials for a period of approximately 50 days, which may also lead to litigation.
- Curtail the Drug Dependent Offenders Program, which would be counterproductive in that defendants eligible for release under the program would remain incarcerated at substantially greater cost to the taxpayers.
- Abandon court facilities at statutory places of holding court to reduce charges for the rental of space.
- Freeze the current level of court security and defer replacing obsolete security systems, which would make the judges vulnerable and

> possibly the targets of violence and intimidation during this period of increased worldwide terrorist activity.

Therefore, we request that Congress not enact any legislation creating new causes of action, services, or duties or expanding federal jurisdiction without a plan to increase judicial resources or adjust jurisdictional arrangements.

As retired Chief Justice Burger has stated: "A form of mass neurosis leads many people to think courts were created to solve all the problems of mankind. We must learn from the experience of labor and management that courts are not the best places to resolve certain kinds of claims."*/ The Judicial Conference has recognized that increasing resources alone is not a complete answer to workload increases, and has repeatedly recommended adjustments in jurisdictional arrangements as an alternative remedial action. Reserving federal trial and appellate courts for matters vital to our national interest that only they can resolve is more necessary today than at any previous point in history. The Conference has continually recommended abolition of diversity jurisdiction and creation of Article I Executive Branch tribunals, modeled after the Tax Court, for review of benefit claims cases. It has also endorsed a range of alternative dispute resolution techniques, such as arbitration and mediation.

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*/Remarks of Warren E. Burger, Chief Justice of the United States, Twin Cities Advisory Council of the American Arbitration Association (August 21, 1985).

Nevertheless, year after year Congress has statutorily expanded federal jurisdiction. In every Congress for the past twelve years, proposals have been introduced to expand federal jurisdiction, many have been enacted, and almost no consideration has been accorded the workload consequences for the federal court system. The influx of veterans' benefit cases into the federal court system, as contemplated in S. 11, can not be accommodated without sacrificing services to the American public. In fact, we estimate that, should this proposal be enacted, we would have to increase the number of judgeships that we will be requesting as a result of the 1988 biennial survey, an increase above and beyond the biennial survey results.

Under S. 11 and with the current Board of Veterans Appeals (BVA) remaining at 65 members, the BVA expects to decide 32,500 cases per year, of which they estimate denying 70% (or 22,750). Of that number, approximately 20% will be appealed to the district courts or 4,550 cases. This increase in district court caseload, on the limited basis of reviewing the record with no need to remand for expansion of the record, would require the equivalent of 11 additional judgeships and 49 deputy clerks at a first year cost of $8.1 million, and $6.1 million in succeeding years (no additive for inflation). With additional members, BVA estimates it may handle as many as 46,000 cases per year, thus 6,440 cases per year may ultimately be brought before the district courts. This would require authorizing the equivalent of an additional 16 judgeships and 70 deputy clerks, at a cost of $11.8 million the first year and $8.9 million per year thereafter, again assuming review on the limited basis of reviewing the record with no need to remand for expansion of the record. The cost to the Judiciary of establishing a new district judgeship is attached at Appendix B. If any factual determinations by the court or numerous remands to the Administrator are required, then the number of required judgeships and clerks and the cost could easily triple.

It can be anticipated that roughly 5% to 6% of total VA claim filings at the district court level will ultimately be brought before a Court of Appeals. This estimate is based solely upon statistics gathered from the appeals of Social Security cases over the past seven years (1981-1987), which are attached as Appendix C. Thus, nationwide the appeals courts could expect between 250 and 335 VA case filings per year, depending upon expansion of the 65-member BVA. This number of cases could require the establishment of the equivalent of 2 additional circuit judges at a cost of $1.4 million the first year and $1.1 million annually thereafter.

The cost to the Judiciary of establishing a new circuit judgeship is attached at Appendix D.

Because this bill includes a provision to allow for district court filing of cases decided by BVA on or after April 1, 1987, we would expect an initial glut of these "older" cases, probably within the first year of the bill's enactment. BVA estimates that there will have been denials during the period, and approximately 10% of these, or 2,275 cases, will be brought into United States district courts. In addition, since there is no statute of limitations on the reopening of claims for the introduction of new and material evidence and for good cause shown, many claims previously denied could be reopened due to the advent of judicial review. This large number of cases would pose a burden on the Judiciary since each judge would normally be expected to hear and decide approximately 400 cases per year. If past is prologue, it may be years before stresses created by providing judicial review can possibly be accommodated. Either the retroactive effective date provisions of S. 11 or the provisions for reopening of claims with no statute of limitations alone would assure that a glut of cases will be filed in the first six months, when the courts would be the least experienced in handling such matters.

Let me now turn to substantive, non-workload related reasons for our objections to broad authorization of judicial review of veterans claims in the Judicial Branch. The Supreme Court recognized the central problems in providing for judicial review of veterans' claims for benefits in Johnson v. Robinson, 415 U.S. 361 (1973) at 370, by explaining the purposes behind a non-review clause:

1) to insure that veterans' benefit claims will not burden the courts and the Veterans' Administration with expensive and time-consuming litigation.

2) to insure that technical and complex determinations and applications of Veterans' Administration policy connected with veterans' benefits decisions will be adequately and uniformly made. (Emphasis added).

Any such litigation in the courts would be expensive and fraught with delay. The experience with social security cases is illustrative. Because of the large numbers of criminal cases and others that have priority, the social security cases move very slowly through the court system, and it is not unusual to find an appeal in the court of appeals involving a claim filed five or more years prior to submission of the appeal to a three-judge panel. This delay is extremely undesirable. However, because of the heavy caseload of the courts, such delay is inevitable.

We, therefore, believe that, if Judicial Branch review is deemed desirable by Congress, then judicial review should be limited to the review of constitutional issues and questions of statutory interpretation. That fundamental duty is one the courts will always perform, regardless of the burden. The Judicial Conference recommends, however, that legislation not be enacted which would impose upon the district courts repetitive review of factual questions concerning provision of veterans' benefits. The provision of judicial review of any factual determinations of the Veterans Administration would pose a substantial new burden for the district courts and at the same time would undermine the fact-finding process within the Veterans Administration.

The courts are not well equipped to determine such factual issues as whether or not an injury is service-connected or to determine other medical or technical questions, which are of a type the Veterans Administration confronts all of the time uniformly. In most social security cases, four judges and a United States magistrate are required to review the same record for factual error after it has received administrative review at a high level. The typical record in a social security disability case consists primarily of medical evidence of a technical nature. A conscientious judge called upon to review such a record cannot make a decision without informing himself or herself fully with respect to the medical issues. It would appear that cases involving claims for benefits before the Veterans Administration would be quite similar to disability claims under the Social Security Act. With rare exceptions, cases involving social security disability present only factual issues for determination and it would appear that the same would be true of cases involving claims before the Veterans Administration. A specialized Article I tribunal would quickly acquire expertise in the subject matter of benefits' appeals and should be able to make decisions more quickly and on the basis of a better understanding of the record than a court of general jurisdiction.

In addition, factual questions are not susceptible to judicial standardization. Thus, the decisions of the federal courts in those matters would inevitably lack uniformity. Persons with similar claims against one federal agency could receive different results depending on where they file their claim for judicial review. This in turn could cause the Veterans Administration to treat those who seek benefits differently, depending upon the region in which a claim is filed. This would certainly not seem fair. Although the Supreme Court can resolve such conflicts, the workload of the Court already precludes granting certiorari to resolve all existing conflicts between the circuits, and the Court could not realistically use the writ of certiorari to resolve inconsistent factual questions between circuits. Although S. 11 requires that a finding of material fact be set aside only when "it is so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice would result", much litigation will be engendered as to the exact meaning of this standard and as to whether the finding of material fact alleged meets this standard.

If appellate review is to be authorized, we prefer that it be based upon the same procedures and venue as presently provided for review of decisions of the United States Tax Court. See section 7481 of the Internal Revenue Code. In this manner, any factual determinations of the Veterans Administration would be accorded proper finality. Only questions of interpretation of statutory and constitutional law would be subject to review.

You asked us to consider whether it would be advantageous to place judicial review of veterans' claims for benefits in the courts of appeals. If you mean simply to substitute the courts of appeals for the district courts in S. 11, we would still be opposed to such judicial review. Although the courts of appeals are more accustomed to record review, reviewing a record for factual determination could no more countenanced in the courts of appeals than in the district court. Such review would remain time-consuming, expensive and would still lack uniformity. In addition, the courts of appeals could not handle the caseload any better than the district courts, unless the review were by writ of certiorari as opposed to mandatory review. If, however, you mean that judicial review would consist of only constitutional issues and statutory interpretation in the courts of appeals, we would have no objection.

On April 18, Senator Murkowski introduced S. 2292, the Veterans' Judicial Review Act. This bill provides for review of the Veterans' Administration rules and regulations in the courts of appeals. We believe this approach is preferable to S. 11. This approach removes the need for factual determinations and confines the review to questions of interpretation of statutory and constitutional law. As we stated before, that is a fundamental duty which we will always perform, regardless of the burden.

In addition, section 5(b)(4) provides that when the BVA rules that a regulation of the Veterans' Administration is invalid, the Administrator may petition for review to the U. S. Court of Appeals for the Federal Circuit. Chief Judge Howard T. Markey of the U. S. Court of Appeals for the Federal Circuit, speaking for the court, has stated that the court has no objections to this provision. He anticipates only a few cases arising under this section, but cautions that, if there are a significant number of cases, he may require additional resources to handle these cases and others which may arise under the Childhood Vaccine Injury Act, involving the review of compensation granted to children injured by inoculations, which took effect recently. As to other provisions in the bill, we will, of course, have no comment on those portions having to do with the internal administration of the Veterans' Administration as they are matters of policy between the Executive and Legislative Branches.

Growth and development in the Federal Judicial Branch has not been the singular province of the House and Senate Judiciary Committees for many years. The result has been an unstructured -- and often contradictory -- growth in the jurisdiction of the federal courts. Proposals for the creation of Article I Executive Branch courts to review Social Security cases, immigration cases and other governmental benefits have acknowledged the panoply of inconsistent standards for judicial review of agency actions and have manifested an effort to fashion a more uniform policy approach to wisely "spending" Judicial Branch resources. For the branch of government that is principally devoted to the adjudication of cases and controversies involving fundamental rights, inconsistency and contradiction in law are major impediments to efficiency and economy. We must suggest to you, as we have innumerable times to others, that the lack of a unified policy for judicial review is a great source of inconvenience and concern -- not only to judges, but to the litigants, attorneys, and members of the Judiciary and Appropriations Committees of Congress.

The Judicial Conference opposes a sweeping authorization for district court judicial review of veterans' claims as contemplated by S. 11. In the alternative, we suggest, if Congress determines that review is necessary, that such review remain with the Board of Veterans Appeals or be conferred upon a new Article I Executive Branch court. Judicial review should be limited to review of constitutional issues or statutory interpretations, as contemplated in S. 2292. Appellate review could be had either in the district court, as is done in Social Security cases, or in the court of appeals under jurisdictional and venue provisions similar to the review of the decisions of the United States Tax Court. Accordingly, we would have no objections to enactment of S. 2292, the Veterans' Judicial Review Act, but would oppose enactment of S. 11, Veterans' Administration Adjudication Procedure and Judicial Review Act.

Attorneys' Fees

A subsidiary issue that arises is the issue of whether attorneys' fees should be awarded. We, of course, take no position on the awarding of attorneys' fees, as this is a matter of policy for the Legislative and Executive Branches, especially in relation to those fees awarded during representation before the Veterans' Administration. However, we do express some concern about the taxation of attorneys' fees in general.

The general rule -- often referred to as the "American Rule" because American courts long ago departed from the common law of England in this respect -- is that each party is responsible for the payment of his or her own attorneys' fees. In short, while court costs may be taxable against the losing party, even the successful litigant will usually be required to absorb the costs of legal representation. Many bills that would now grant expanded jurisdiction to the Federal courts also change this rule insofar as litigation arising under the particular statute is concerned.

The Judicial Conference has for many years cautioned against this piecemeal erosion of the American Rule. If the Congress wishes to change the scope of taxable costs and fees in federal court litigation, that change should be made as a fundamental change of policy, not implemented through piece-by-piece disintegration of the American Rule. Accordingly, we have suggested, on several occasions, that Congress review the entire question of taxation of attorneys' fees and establish a uniform policy.

Today the Equal Access to Justice Act, 28 U.S.C. 2412(d), provides that attorneys' fees may be awarded against the United States, if the court determines that the position asserted by the United States was not "substantially justified", to an individual with a net worth not exceeding $1,000,000 or an organization with a net worth not exceeding $5,000,000. Even with this general provision, there are substantial problems of interpretation, and substantial "satellite" litigation has arisen. First, the court must determine whether a party has "prevailed" against the United States. Second, the court must determine whether the position of the United States was "substantially justified". Third, the court must determine the net worth of the individual or organization in order to determine whether the individual or organization is eligible for attorneys' fees. Thus, these provisions create a significant workload of their own.

The creation of a separate attorneys' fee award under a new grant of judicial review over veterans claims will create even more satellite litigation. The Veterans Administration, in an understandable assumption that litigation losses will not result in substantial attorneys' fee awards, is unable to estimate either the administrative or judicial costs. We are convinced, however, that there may well be substantial increased costs to the judicial system in terms of satellite litigation. Indeed, we may fairly speculate that, at the beginning at least, the possibility of an award of attorneys' fees will become an incentive to litigation -- particularly where there is no disincentive from the threat of an award of attorneys' fees against an unsuccessful plaintiff.

In addition, even if we assume that jurisdiction is provided in the district courts, that a veteran is successful in a suit, that court costs will be automatically taxed, and that the veteran may apply for attorneys' fees, we are still not free to assume that he will emerge from the exercise as he anticipated he would. Historically, awards of attorneys' fees have been substantially less than the actual cost of counsel. Even a successful litigant who is awarded a reasonable attorney's fee will ultimately incur additional costs. How much those additional costs, including subsidiary non-taxable costs of ~~the liti~~gation, will actually reduce an award of veterans benefits is difficult to estimate for the average case, but we may fairly assume that even successful litigants seeking veterans benefits will complete the process with less than that which they expected.

Accordingly, we urge Congress to consider the question of awards of attorneys' fees on a much broader policy ground. We recommend a general rule, rather than continued piecemeal erosion of the American Rule that has guided the courts for so long.

Conclusion

The Judicial Conference of the United States does not recommend the authorization of comprehensive or broad judicial review of veterans' claims. A broad grant of judicial review will unnecessarily burden already overcrowded court dockets with repetitious review of factual determinations and necessitate a request for additional judgeships. The long-range solution is not to create more and more judgeships, even though they are needed right now. We must move toward taking a large volume of conflicts out of the courts, not putting new ones in the courts. Therefore, the Judicial Conference has continually favored the abolition of diversity of citizenship jurisdiction, the creation of Article I Executive Branch courts to review governmental benefit cases, and voluntary alternative dispute resolution techniques such as arbitration and mediation. Money alone will not solve all of the Judiciary's problems, but limited resources in the short run do impair our ability to repeatedly respond to unanticipated changes, and we are definitely in a period of limited resources.

If Congress ultimately determines that Judicial Branch review is desirable, that review should be limited to questions involving constitutional and statutory interpretation. Any grant of judicial review places not only a caseload strain upon the courts but also must be considered in light of the overall theory of Judicial Branch review and the realities of economy and efficiency that influence resource allocation.

APPENDIX A

EXHIBIT A

MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

January 1988

William H. Rehnquist, Chief Justice	Presiding
Chief Judge Levin H. Campbell	First Circuit
Chief Judge Juan M. Perez-Gimenez	Puerto Rico
Chief Judge Wilfred Feinberg	Second Circuit
Chief Judge John T. Curtin	New York (Western)
Chief Judge John J. Gibbons	Third Circuit
Chief Judge William J. Nealon, Jr.	Pennsylvania (Middle)
Chief Judge Harrison L. Winter	Fourth Circuit
Judge Frank A. Kaufman	Maryland
Chief Judge Charles Clark	Fifth Circuit
Chief Judge L. T. Senter, Jr.	Mississippi (Northern)
Chief Judge Pierce Lively	Sixth Circuit
Chief Judge Philip Pratt	Michigan (Eastern)
Chief Judge William J. Bauer	Seventh Circuit
Judge Sarah Evans Barker	Indiana (Southern)
Chief Judge Donald P. Lay	Eighth Circuit
Chief Judge John F. Nangle	Missouri (Eastern)
Chief Judge James R. Browning	Ninth Circuit
Chief Judge Robert F. Peckham	California (Northern)
Chief Judge William J. Holloway	Tenth Circuit
Chief Judge Sherman G. Finesilver	Colorado
Chief Judge Paul H. Roney	Eleventh Circuit
Chief Judge Sam C. Pointer	Alabama (Northern)
Chief Judge Patricia M. Wald	District of Columbia Circuit
Chief Judge Aubrey Robinson	District of Columbia
Chief Judge Howard T. Markey	Federal Circuit
Chief Judge Edward D. Re	International Trade

EXHIBIT D

MEMBERS OF THE COMMITTEES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

(All terms expire on October 1 of the year listed.)

THE EXECUTIVE COMMITTEE

Wilfred Feinberg Chairman	C	Second Circuit	Open
Levin H. Campbell	C	First Circuit	Open
Charles Clark	C	Fifth Circuit	Open
L. Ralph Mecham*	DIR, AO	Washington DC	Open
John F. Nangle	D	Missouri (E)	Open
Robert F. Peckham	D	California (N)	Open
Aubrey E. Robinson, Jr.	D	Washington, DC	Open
Paul H. Roney	C	Eleventh Circuit	Open

Staff: Karen K. Siegel (633-6137)

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* Ex-officio

COMMITTEE ON THE ADMINISTRATIVE OFFICE

Harlington Wood, Jr. Chairman	C	Seventh Circuit	1990
Bobby R. Baldock	C	Tenth Circuit	1990
Charles L. Brieant	D	New York (S)	1989
Joel M. Flaum	C	Seventh Circuit	1989
Michael R. Hogan	M	Oregon	1991
David W. Houston, III	B	Mississippi (N)	1991
Thomas P. Jackson	D	Washington, DC	1991
Scott O. Wright	D	Missouri (E)	1990

Staff: James E. Macklin, Jr. (633-6135)

COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM

Morey L. Sear Chairman	D	Louisiana (E)	1990
Marvin E. Aspen	D	Illinois (N)	1989
G. William Brown	B	Kentucky (W)	1989
Joseph L. Cossetti	B	Pennsylvania (W)	1990
Conrad K. Cyr	D	Maine	1989
Garnett T. Eisele	D	Arkansas (E)	1988
James H. Hancock	D	Alabama (N)	1988
Bruce S. Jenkins	D	Utah	1989
Robert R. Merhige, Jr.	SD	Virginia (E)	1988
Laurence Silberman	C	Washington, DC	1990
Robert W. Skidmore	B	Washington (W)	1988
Robert W. Sweet	D	New York (S)	1990

Staff: Frank Szczebak (633-6231)

COMMITTEE ON THE BICENTENNIAL OF THE CONSTITUTION

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Warren E. Burger	RCJUST	Supr. Ct., Wash., DC	Open
Arthur L. Alarcon	C	Ninth Circuit	Open
Frank X. Altimari	C	Second Circuit	Open
Adrian G. Duplantier	D	Louisiana (E)	Open
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James H. Meredith	SD	Missouri (E)	Open
Robert C. Murphy	AJust	App. Ct., Maryland	Open
Helen W. Nies	C	Federal Circuit	Open
James E. Noland	SD	Indiana (S)	Open
Jaime Pieras	D	Puerto Rico	Open
Delores K. Sloviter	C	Third Circuit	Open
Kenneth W. Starr	C	Washington, DC	Open
J. Harvie Wilkinson	C	Fourth Circuit	Open

Staff: William R. Burchill, Jr. (633-6127)

COMMITTEE ON THE BUDGET

Richard S. Arnold Chairman	C	Eighth Circuit	Open
Sol Blatt	D	South Carolina	Open
Ralph H. Kelley	B	Tennessee (E)	Open
Thomas J. Meskill	C	Second Circuit	Open
Donald E. O'Brien	D	Iowa (N)	Open
Owen Panner	D	Oregon	Open
William G. Young	D	Massachusetts	Open

Staff: Raymond A. Karam (633-6101)

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John D. Holschuh	D	Ohio (S)	1990
John B. Jones	D	South Dakota	1991
Henry A. Politz	C	Fifth Circuit	1991
David Sam	D	Utah	1991
James M. Sprouse	C	Fourth Circuit	1991
Robert M. Takasugi	D	California (C)	1992
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Patricia M. Wald	C	Washington, DC	1992
James B. Zagel	D	Illinois (N)	1990

Staff: R. Townsend Robinson (633-5987)

COMMITTEE ON COURT SECURITY

Juan Perez-Gimenez Chairman	D	Puerto Rico	1990
Cornelius Blackshear	B	New York (S)	1988
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Dudley H. Bowen, Jr.	D	Georgia (S)	1989
William D. Browning	D	Arizona	1990
Frank A. Kaufman	SD	Maryland	1988
John M. Roper	M	Mississippi (S)	1989
Stanley Sporkin	D	Washington, DC	1988
Deanell R. Tacha	C	Tenth Circuit	1990

Staff: William A. Cohan (786-6003)

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James G. Carr	M	Ohio (N)	1989
Sherman G. Finesilver	D	Colorado	1988
Thomas Gibbs Gee	C	Fifth Circuit	1990
Lenore C. Nesbitt	D	Florida (S)	1990
Cecil F. Poole	SC	Ninth Circuit	1988
John W. Reynolds	SD	Wisconsin (E)	1988
Charles R. Richey	D	Washington, DC	1988
Harry W. Wellford	C	Sixth Circuit	1989
Mark L. Wolf	D	Massachusetts	1988

Staff: Donald L. Chamlee (633-6226)

COMMITTEE ON DEFENDER SERVICES

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Odell Horton	D	Tennessee (W)	1990
Edward C. Prado	D	Texas (W)	1990
Harry A. Pregerson	C	Ninth Circuit	1989
Eugene P. Spellman	D	Florida (S)	1989

Staff: Theodore J. Lidz (633-6051)

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Harry L. Carrico	CJUST	Supr.Ct., Virginia	1988
George E. Danielson	JUDGE	App. Ct., California	1989
J. Foy Guin	D	Alabama (N)	1988
Patrick E. Higginbotham	C	Fifth Circuit	1990
James L. Latchum	D	Delaware	1988
Boyce F. Martin	C	Sixth Circuit	1989
Vincent L. McKusick	CJUST	Maine	1990
Roger J.. Miner	C	Second Circuit	1989
Thomas M. Reavley	C	Fifth Circuit	1989
Robert F. Stephens	CJUST	Kentucky	1989
Edward Cooper Reporter	PROF	Michigan	Open

Staff: Paul C. Summitt (633-6040)

COMMITTEE ON INTERCIRCUIT ASSIGNMENTS

Thomas A. Flannery Chairman	SD	Wasington, DC	1990
Louis F. Oberdorfer	D	Washington, DC	1988
Bruce M. Selya	C	First Circuit	1990
William H. Stafford, Jr.	D	Florida (N)	1989

Staff: Marion Ott (633-6099)

COMMITTEE ON THE INTERNATIONAL APPELLATE JUDGES CONFERENCE OF 1989/90

Howard T. Markey Chairman	C	Federal Circuit	Open
Shirley S. Abrahamson	AJUST	Supr.Ct., Wisconsin	Open
William J. Bauer	C	Seventh Circuit	Open
James R. Browning	C	Ninth Circuit	Open
Cynthia H. Hall	C	Ninth Circuit	Open

Staff: James E. Macklin, Jr. (633-6135)
Charles W. Nihan (633-6321)

COMMITTEE ON THE JUDICIAL BRANCH

Frank M. Coffin Chairman	C	First Circuit	1990
Anthony A. Alaimo	D	Georgia (S)	1988
George Arceneaux, Jr.	D	Louisiana (E)	1989
Jean Bissell	C	Federal Circuit	1989
Ralph B. Guy, Jr.	C	Sixth Circuit	1990
William L. Hungate	D	Missouri (E)	1990
Pierre N. Leval	D	New York (S)	1989
Michael M. Mihm	D	Illinois (C)	1989
Abner J. Mikva	C	Washington, DC	1988
Earl O'Connor	D	Kansas	1988
Justin L. Quackenbush	D	Washington (E)	1990
Jane R. Roth	D	Delaware	1990
Charles E. Simons, Jr.	SD	South Carolina	1988
Philip W. Tone	ESQ	Illinois	1990

Staff: William R. Burchill, Jr. (633-6127)

COMMITTEE ON JUDICIAL ETHICS

John H. Pratt Chairman	D	Washington, DC	1992
Howard C. Bratton	SD	New Mexico	1992
Julian A. Cook	D	Michigan (E)	1992
Dickinson R. Debevoise	D	New Jersey	1991
Leonard I. Garth	SC	Third Circuit	1990
Horace W. Gilmore	D	Michigan (E)	1991
F. A. Little	D	Louisiana (W)	1992
Lloyd F. MacMahon	SD	New York (S)	1990
Frank J. Magill	C	Eighth Circuit	1991
David S. Nelson	D	Massachusetts	1990
Norman P. Ramsey	D	Maryland	1991
Carolyn D. Randall	C	Fifth Circuit	~~1991~~
William E. Steckler	SD	Indiana (S)	1990
Eugene A. Wright	SC	Ninth Circuit	1992

Staff: Raymond A. Karam (633-6101)

COMMITTEE ON JUDICIAL IMPROVEMENTS

Richard M. Bilby Chairman	D	Arizona	1990
Harold A. Baker	D	Illinois (C)	1990
Susan H. Black	D	Florida (M)	1990
Samuel S. Ervin, III	C	Fourth Circuit	1989
Benjamin F. Gibson	D	Michigan (W)	1989
Gerald W. Heaney	C	Eighth Circuit	1989
D. Brock Hornby	M	Maine	1988
Norma H. Johnson	D	Washington, DC	1988
Beryl E. McGuire	B	New York (W)	1988
John P. Moore	C	Tenth Circuit	1989
James L. Oakes	C	Second Circuit	1990
Robert M. Parker	D	Texas (E)	1990
Jane A. Restani	CIT	New York	1989
H. Lee Sarokin	D	New Jersey	1989
Rya W. Zobel	D	Massachusetts	1988

Staff: Karen K. Siegel (633-6137)

COMMITTEE ON JUDICIAL RESOURCES

Walter T. McGovern Chairman	SD	Washington (W)	1990
Terrence W. Boyle	D	North Carolina (E)	1989
George C. Carr	D	Florida (M)	1989
Robert S. Carr	M	South Carolina	1989
Patricia A. Clark	B	Colorado	1988
T. F. Gilroy Daly	D	Connecticut	1988
Clarkson S. Fisher	SD	New Jersey	1990
W. Arthur Garrity	D	Massachusetts	1988
Douglas Ginsburg	C	Washington, DC	1990
William C. Lee	D	Indiana (N)	1990
Gilbert S. Merritt	C	Sixth Circuit	1990
Donald R. Ross	SC	Eighth Circuit	1989
David L. Russell	D	Oklahoma (N,E,W)	1989
Tom Stagg	D	Louisiana (W)	1988

Staff: Raymond A. Karan (633-6101)

COMMITTEE ON ADMINISTRATION OF THE MAGISTRATES SYSTEM

Joseph W. Hatchett Chairman	C	Eleventh Circuit	1990
Louis C. Bechtle	D	Pennsylvania (E)	1990
Gene Carter	D	Maine	1989
Avern L. Cohn	D	Michigan (E)	1990
H. Dale Cook	D	Oklahoma (N)	1988
William B. Enright	D	California (S)	1989
John R. Gibson	C	Eighth Circuit	1988
John Paul Godich	M	Indiana (S)	1990
William T. Hart	D	Illinois (N)	1989
Thomas F. Hogan	D	Washington, DC	1989
Thomas C. Platt	D	New York (E)	1988
Ila Jeane Sensenich	M	Pennsylvania (W)	1989
Frederic N. Smalkin	D	Maryland	1990
Venetta Tassopulos	M	California (C)	1988
Filemon B. Vela	D	Texas (S)	1988

Staff: John Thomas Jones (633-6251)

COMMITTEE ON PACIFIC TERRITORIES

Anthony M. Kennedy Chairman	C	~~Ninth Circuit~~ Supreme Court	1990
Jerome Farris	C	Ninth Circuit	1989
Samuel P. King	SD	Hawaii	1988

Staff: William R. Burchill, Jr (633-6127)

COMMITTEE TO REVIEW CIRCUIT COUNCIL CONDUCT AND DISABILITY ORDERS

Clement F. Haynsworth, Jr. Chairman	C	Fourth Circuit	1990
Edward J. Devitt	SD	Minnesota	1988
Charles W. Joiner	SD	Michigan (E)	1989

Staff: William R. Burchill, Jr. (633-6127)

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Joseph F. Weis, Jr. Chairman	C	Third Circuit	1990
W. Reece Bader	ESQ	California	1989
Sarah E. Barker	D	Indiana (S)	1999
Amalya L. Kearse	C	Second Circuit	1988
Robert E. Keeton	D	Massachusetts	1990
Wayne R. LaFave	PROF	Illinois	1989
Pierce Lively	C	Sixth Circuit	1989
Gael Mahony	ESQ	New York	1988
Edwin J. Peterson	CJUST	Supr.Ct., Oregon	1990
Sam Pointer	D	Alabama (N)	1989
Charles E. Wiggins	C	Ninth Circuit	1988
Charles A. Wright	PROF	Texas	1990
Daniel Coquillette Reporter	DEAN	Massachusetts	Open

Staff: James E. Macklin, Jr. (633-6135)

ADVISORY COMMITTEE ON APPELLATE RULES

Jon O. Newman Chairman	C	Second Circuit	1990
Robert H. Bork	C	Washington, DC	1988
Myron H. Bright	SC	Eighth Circuit	1990
Peter T. Fay	C	Eleventh Circuit	1989
Charles Fried*	SOL GEN	Washington, DC	Open
Donald F. Froeb	AJUST	Arizona	1990
Rex E. Lee	ESQ	Utah	1988
Kenneth F. Ripple	C	Seventh Circuit	1989
Carol Ann Mooney Reporter	PROF	Indiana	Open

Staff: James E. Macklin, Jr. (633-6135)

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* Ex-officio

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Lloyd D. George Chairman	D	Nevada	1990
James J. Barta	B	Missouri (W)	1988
Harry D. Dixon	ESQ	Nebraska	1989
Franklin T. Dupree	D	North Carolina (E)	1988
Edith H. Jones	C	Fifth Circuit	1989
Lawrence P. King	PROF	New York	1988
Edward Leavy	C	Ninth Circuit	1989
Ralph R. Mabey	ESQ	Utah	1990
Paul Mannes	B	Maryland	1990
Joseph L. McGlynn	D	Pennsylvania (E)	1990
Herbert P. Minkel	ESQ	New York	1990
Joseph Patchan	ESQ	Ohio	1988
Bernard Shapiro	ESQ	California	1989
Thomas A. Wiseman	D	Tennessee (M)	1989
Alan N. Resnick Reporter	PROF	New York	Open

Staff: James E. Macklin, Jr. (633-6135)

ADVISORY COMMITTEE ON CIVIL RULES

John F. Grady Chairman	D	Illinois (N)	1990
Larrine S. Holbrooke	ESQ	Washington, DC	1988
Dennis G. Linder*	ESQ	Justice Dept., Wash DC	Open
Arthur R. Miller	PROF	Massachusetts	1988
Mariana R. Pfaelzer	D	California (C)	1988
James D. Phillips	C	Fourth Circuit	1989
James Powers	ESQ	Arizona	1989
Joseph E. Stevens	D	Missouri (W)	1989
Ralph K. Winter	C	Second Circuit	1990
Michael D. Zimmerman	AJUST	Supr. Ct., Utah	1989
Paul D. Carrington Reporter	DEAN	North Carolina	Open

Staff: James E. Macklin, Jr. (633-6135)

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* Ex-officio

ADVISORY COMMITTEE ON CRIMINAL RULES

Leland C. Nielsen Chairman	SD	California (S)	1990
James DeAnda	D	Texas (S)	1989
John Doar	ESQ	New York	1990
James Exum	AJUST	Supr.Ct., N. Carolina	1990
James F. Hewitt	ESQ	California	1988
William T. Hodges	D	Florida (M)	1990
John F. Keenan	D	New York (S)	1989
Frederick B. Lacey	ESQ	New Jersey	1988
Edward F. Marek	FPD	Ohio (N)	1990
Herbert Miller	ESQ	Washington, DC	1988
Harvey Schlesinger	M	Florida (M)	1989
William Weld*	ESQ	Justice Dept., Wash. DC	Open
Stephen A. Saltzburg Reporter	PROF	Virginia	Open

Staff: James E. Macklin, Jr. (633-6135)

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* Ex-officio

COMMITTEE ON SPACE AND FACILITIES

Robert S. Vance Chairman	C	Eleventh Circuit	1990
Robert C. Broomfield	D	Arizona	1990
Stanley S. Brotman	D	New Jersey	1989
I. Leo Glasser	D	New York (E)	1988
Michael S. Kanne	C	Seventh Circuit	1988
T. Harley Kingsmill	B	Louisiana (E)	1989
Jackson L. Kiser	D	Virginia (W)	1988
Theodore McMillian	C	Eighth Circuit	1989
John V. Parker	D	Louisiana (M)	1988
Richard D. Rogers	D	Kansas	1990
James L. Ryan	C	Sixth Circuit	1990
Jack D. Shanstrom	M	Montana	1989
Douglas P. Woodlock	D	Massachusetts	1990

Staff: Raymond A. Karan (633-6101)

APPENDIX B

COST TO THE JUDICIARY OF ESTABLISHING A NEW DISTRICT JUDGESHIP

Appropriation: Salaries and Expenses

Activity: Salaries of Judges

Salary of the Judge	$ 89,500	
Agency contribution for life insurance, health benefits, Medicare, Social Security, and the Judicial Survivors' Annuities Fund	6,200	
TOTAL	95,700	

Activity: Salaries of Supporting Personnel*

Salaries: Law Clerk, Grade JSP-12	33,218	
Law Clerk, Grade JSP-12	33,218	
Secretary, Grade JSP-10	25,227	
Court Reporter, Ungraded	37,185	
Deputy Clerk, Grade JSP-9**	22,907	
Agency contribution for civil service retirement, life insurance, health benefits, Medicare, and Social Security	33,145	
TOTAL	184,900	

Activity: Expenses of Operation and Maintenance of the Courts

Travel, Judge and staff	8,500	
Miscellaneous expenses (communications, supplies, etc.)		
Initial cost	10,000	
Annual cost (second and succeeding years)	14,800	
General office equipment:		
Initial cost	11,400	NR
Annual cost (second and succeeding years)	(2,300)	
Telephone equipment:		
Initial cost	4,600	NR
Annual cost (second and succeeding years)	(600)	
Word processing equipment purchase:		
Initial cost	43,200	NR
Annual cost (second and succeeding years)	(8,600)	
Library: Initial cost	29,100	NR
Annual cost (second and succeeding years)	3,800	
Furniture and furnishings:		
Initial cost	82,200	NR
Annual cost (second and succeeding years)	(8,200)	
TOTAL (initial cost)	189,000	
TOTAL (annual recurring cost)	46,800	

Activity: Space and Facilities

Rental of space	92,000	
Tenant alterations and other reimbursable services	14,800	
TOTAL	106,800	

Appropriation: Court Security

Estimated cost of one court security officer	30,400	
Initial equipment, uniform, bench armor, etc.	18,800	NR
TOTAL (initial cost)	49,200	
TOTAL (annual recurring cost)	30,400	

Appropriation: Administrative Office of the U.S. Courts

Salaries and expenses of professional and clerical staff (unit cost based on a ratio of one professional position and one clerical position to every 12 new judgeships)***	5,700	

GRAND TOTALS:

Initial (first year) cost (rounded)	$631,000
Annual recurring cost (rounded)	$470,000

*Includes projected 2 percent salary increase effective January 1986.

**Based on ratio of 1.5 deputy clerks per authorized judgeship.

***Final staff support to be determined by the AO Budget Review Committee.

NR Nonrecurring expense

Prepared in: A.O. Budget Branch
Date: February 12, 1986

APPENDIX C

Twelve Regional Courts of Appeals
Appeals of Social Security Cases
Arising from the U.S. District Courts
During the Twelve Month Periods Ended June 30, 1981-1987

	1981	1982	1983	1984	1985	1986	1987
Total Filings	657	779	992	1,216	1,202	1,195	992
Total Dispositions	697	759	738	1,117	1,326	1,071**	1,094**
After Oral Hearing or Submission							
Total	520	517	516	781	900	780	837
Affirmed	374	334	373	514	468	448	509
Reversed	119	160	119	214	351	244	252
Dismissed	9	2	3	10	15	21	26
Remanded	18	21	21	43	61	61	45
Other	-	-	-	-	5	6	5
Other Judicial Action*	57	95	86	137	222	119	80
With Judicial Action	120	147	136	199	204	172	177

* Includes procedural terminations after judicial action such as jurisdictional defects, FRAP 42, default, CPC denial, transferred, and dismissed other.

** Excludes joined appeals.

APPENDIX D

COST TO THE JUDICIARY OF ESTABLISHING A NEW CIRCUIT JUDGESHIP

Appropriation: Salaries and Expenses		
Activity: Salaries of Judges		
Salary of the Judge	$ 95,000	
Agency contribution for life insurance, health benefits, Medicare, Social Security and the Judicial Survivors' Annuities Fund	6,600	
TOTAL	101,600	
Activity: Salaries of Supporting Personnel*		
Salaries: Law Clerk, Grade JSP-12	33,218	
Law Clerk, Grade JSP-12	33,218	
Law Clerk, Grade JSP-12	33,218	
Secretary, Grade JSP-10	25,227	
Secretary, Grade JSP-10	25,227	
Staff Attorney, Central Legal Staff, Grade JSP-12	33,218	
Agency contribution for F.E.R.S., life insurance, health benefits, Medicare, and Social Security	34,882	
TOTAL	218,208	
Activity: Expenses of Operation and Maintenance of the Courts		
Travel, Judge and staff	16,000	
Printing of opinions	14,000	
Miscellaneous expenses (communications, supplies, etc.)		
Initial cost	12,200	
Annual cost (second and succeeding years)	19,100	
General office equipment:		
Initial cost	14,200	NR
Annual cost (second and succeeding years)	(2,800)	
Telephone equipment:		
Initial cost	5,300	NR
Annual cost (second and succeeding years)	(700)	
Word processing equipment purchase:		
Initial cost	64,900	NR
Annual cost (second and succeeding years)	(13,000)	
Library: Initial cost	25,300	NR
Annual cost (second and succeeding years)	(3,800)	
Furniture and furnishings:		
Initial cost	56,200	NR
Annual cost (second and succeeding years)	(5,600)	
TOTAL (initial cost)	208,100	
TOTAL (annual recurring cost)	75,000	
Activity: Space and Facilities		
Rental of space	35,000	
Tenant alterations and other reimbursable services	12,500	
TOTAL	47,500	
Appropriation: Court Security		
Estimated cost of one court security officer	30,400	
Initial equipment, uniform, bench armor, etc.	18,800	NR
TOTAL (initial cost)	49,200	
TOTAL (annual recurring cost)	30,400	
Appropriation: Administrative Office of the U.S. Courts		
Salaries and expenses of professional and clerical staff (unit cost based on a ratio of one professional position and one clerical position to every 12 new judgeships)**	5,700	
GRAND TOTALS:		
Initial (first year) cost (rounded)	$630,000	
Annual recurring cost (rounded)	$478,000	

*Includes projected 2 percent salary increase effective January 1988.
**Final staff support to be determined by the AO Budget Review Committee.

NR Nonrecurring expense

Prepared in: A.O. Budget Branch
Date: February 12, 1988

April 28, 1988

procedure

	first		third		national	
	judges	staff	judges	staff	judges	staff
jurisdiction..	9%	0%	18%	0%	13%	0%
vol.dismiss...	1%	39%	1%	52%	4%	36%
default.......	1%	23%	0%	42%	2%	22%
cpc denial....	2%	0%	8%	0%	8%	0%
other.........	10%	15%	18%	3%	10%	4%
TOTAL	100%		100%		100%	

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written decisions per judge

	first		third		national	
	no.	%	no.	%	no.	%
signed.......	52	48%	60	52%	42	37%
unsigned.....	56	52%	4	3%	57	50%
w/o comment..	0	0%	51	44%	15	13%
TOTAL	108		115		114	

United States Courts of Appeals
National Judicial Workload Profile (Overall)

				ALL COURTS OF APPEALS					
				1987	1986	1985	1984	1983	1982
OVERALL WORKLOAD STATISTICS	APPEALS FILED		Total	35,176	34,292	33,360	31,490	29,630	27,946
			Prisoner	8,488	6,992	6,532	5,964	5,327	4,834
			All Other Civil	18,705	18,979	18,660	17,600	16,444	15,227
			Criminal	5,260	5,134	4,989	4,881	4,790	4,767
			Administrative	2,723	3,187	3,179	3,045	3,069	3,118
			Percent Change in Total Filings — Current Year	Over Last Year ▶ Over Earlier Years ▶	2.6	5.4	11.7	18.7	25.9
	APPEALS TERMINATED		Total	34,444	33,774	31,387	31,185	28,660	27,984
			Consolidations & Cross Appeals	2,689	2,848	2,669	3,953	4,180	4,204
			Procedural	13,253	12,727	12,349	12,905	11,263	11,060
		ON THE MERITS[1]	Total	18,502	18,199	16,369	14,327	13,217	12,720
			Prisoner	3,631	3,345	2,835	2,163	2,052	1,838
			Other Civil	9,996	9,853	9,208	7,916	7,014	6,934
			Criminal	3,308	3,540	3,070	2,927	2,859	2,541
			Administrative	1,567	1,461	1,256	1,321	1,292	1,407
			Percent by Active Judges	82.9	81.8	80.8	81.2	78.7	77.7
	PENDING APPEALS			26,008	25,276	24,758	22,785	22,480	21,510
ACTIONS PER ACTIVE JUDGE[2]	Terminations on the Merits			323	330	308	276	238	237
	Procedural Terminations			87	90	103	116	100	NA
	Written Decisions		Total	114	118	110	NA	NA	NA
			Signed	42	48	45	NA	NA	NA
			Unsigned	57	54	52	NA	NA	NA
			Without Comment	15	16	13	NA	NA	NA

[1] See Page 29.

[2] Includes only judges active during the entire 12 month period.

Informal Remarks made at Williamsburg, Virginia

March 13, 1983

Stephen Breyer[1]

In the next twenty minutes I shall try to put the "incentive" solutions discussed by Breger, Rowe, Miller and others into a broader context. I shall do so by making four points, which I might describe as follows: (1) the nature of the "legal explosion" problem; (2) the shortcomings of "easy" solutions; (3) the alternatives among "difficult" solutions; and (4) problems and promise of "incentive" solutions.

1. The "Legal Explosion" Problem. I see from the federal appellate bench one aspect of the broad "legal explosion" problem. I am tempted to call that aspect "overcrowding," or "too many cases." But, that label is not really correct. A growing caseload is only part of the problem; in fact, it is only background.

I do not mean to deny the importance of caseload. You are all familiar with the statistics. The amount of federal litigation has increased from one case per 4,000 of population in the 1950's to one case per 1,000 today. The number of appeals filed in the federal courts rose from 14,534 in 1972 to 27,946 in 1982. The number filed per judge rose from 150 to 212 despite a 36% increase in appellate judgeships. My experience in the First Circuit is comparable. The number of judges has increased in the last five years from three to four. The number of filings, however, has increased from 563 to more than 1,200 per year. And, each filing represents a case that must be decided. Since we rely upon visiting senior judges to fill our panels, we must decide about 200 cases per judge. Assuming half represent minor matters, we are still left with 100 cases for each judge to decide. Last year I wrote sixty full, signed opinions.

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[1] Judge, U.S. Court of Appeals for the First Circuit.

The wrong conclusion to draw from these numbers is that I am overworked. I work about as long and as hard in this job as I have in other jobs I have held. My work habits are fixed; I am reasonably healthy; I shall not change them. I shall work about the same number of hours regardless of what happens to caseloads. The right conclusion to draw is that my time may not be allocated properly. Sixty opinions per year means between five and seven per month. In each month I must prepare to hear between twenty and twenty-five cases; that takes a little more than a week. That leaves fifteen working days to write, say, six opinions. The question is, should we have caseloads that require judges to produce opinions each of which must take 2 or 3 days on average to write? If so, still, what will happen when caseloads require one-day opinions? In particular, if we are to bear such caseloads, will we be able to devote our limited time to the kind of suits that most need our attention?

I am not prepared to answer "yes" to this question, for it seems to me, on an impressionistic basis, that the federal courts could be used more wisely. On the one hand, I see cases that I suspect should not be in court. I think, for example, of last year's case of the untenured teacher claiming that the university discriminated in denying him tenure because he was a Dane. (He also lacked a Ph.D.; his evidence included an overheard comment referring to him as a "bluebeard.") Or I think of the parents who sued their daughter's school under § 1983 because the girl's midterm algebra grade had been lowered by three points for an unexcused absence. Or I think of another recent "civil rights" case which amounted to not much more than an effort to get more money than a town had already paid a fireman for injuries caused by a sneeze. The cases of the Dane, the "grade" and the "sneeze" -- trivial as they were -- cost someone money. Indeed, the first case may have cost the university between $60,000 and $80,000 -- enough money to put three additional needy students entirely through college.

At the same time, as I ponder the costs of the lawyers who appear before us, I wonder how an average person who suffers a clear, "middle-sized" legal injury could possibly afford to go to court. Suppose a building contractor ruins the roof of his house; or suppose he is cheated of, say, $5,000 or $10,000. Even if the legal right is absolutely clear, how can he afford the legal costs if his opponent decides to resist?

In sum, it seems to me likely that we could use court time, including federal court time more "efficiently." Certain cases now in court should not be there; space and time should be created for other cases now not brought. The rising caseload in and of itself, is background that makes this problem of efficient, proper and wise use of judicial time more poignant and more urgent. And it is in the form of this "efficiency" problem, against a background of rising caseloads, that the "legal explosion" forces its attention upon federal appellate courts.

2. No easy solutions. There are no "easy answers" to the "legal explosion" problem. Three popular answers -- alternative dispute settlement mechanisms, more judges, and increased use of sanctions -- while helpful and important, have serious limitations. I am uncertain, for example, about how many cases or what sorts can and should be channeled into alternative dispute resolving channels. This uncertainty arises from the fact that our object is not simply the "settlement" of disputes, but rather their "*just* settlement."

If one were designing an ideal system for settling disputes, one would surely seek "justice"; one would seek easy and widespread accessibility; one would want the system to be as inexpensive as possible; and one might (if it were a legal system) seek to have it expound and elaborate the law as well as correct its mistakes of legal principle. But, these objectives may conflict, and that conflict accounts in part for our uncertainty about efforts to develop alternative settlement mechanisms, more expeditious courtroom procedures, judicial case management techniques, and other mechanisms with the purpose or effect of more readily promoting agreement.

Nor is there any obviously "easy" solution in the creation of more judgeships or the provision of more court personnel. The federal judiciary has expanded over the last ten years -- from 97 judges to 132 in the courts of appeals and from 399 judges to 516 in the district courts, while the number of total federal judicial personnel has increased from 27.7 per million population in 1960 to 65.6 per million population in 1980. The federal judicial budget has risen from $171 million in 1972 to $709 million in 1982 (and from $137 million to $274 million in constant 1967 dollars). But, this type of "solution" brings with it further problems, for expansion changes the nature of the federal judicial institution, and not necessarily for the better. More staff, for example, means more delegation of decision writing (if not decision-making) to law clerks. Does this mean longer opinions with more footnotes and extraneous analysis? Does it mean the proliferation of complex rules and subsidiary "tests" that needlessly complicate, rather than simplify, the law? Do more judges themselves proliferate opinions and precedents to the point where it becomes increasingly difficult to harmonize the law from different jurisdictions, to keep up with it, or even to say what the law is? Are judges forced to devote more of their time to "managing" -- either cases or the judicial system itself? If so, are they spending less time doing what they are comparatively better at -- deciding cases fairly -- and more at what they are comparatively worse at -- administration? Insofar as one major task of a judicial system is the creation of precedent as guidance to others, there are severe limits on its capacity to grow bureaucratically.

Finally, the increased use of sanctions to deter the pursuit of frivolous suits or harrassing procedures, while desirable, also has limitations. The limitations exist because the judge has only a very limited and incomplete vision of any single case, and one often needs to understand the whole situation before one can fairly assess blame. I recall an instance in which one member of our panel expressed the extreme irritation that all of us were feeling at an absurd argument being made by an attorney suing the government. The attorney replied, "My client is sick and has no money; I am representing him for nothing because I am his friend; I know I'm not doing very well, but I'm trying to do my best for him." Would one want to assess sanctions in such circumstances? How often can a judge assess a sanction without a further hearing on the propriety of the sanction? Will there then be appeals? Will we simply have added to the length and complexity of proceedings that are already too long and complex?

In raising these problems, I am not arguing against alternative dispute mechanisms, more judges or sanctions. I am simply pointing out that they are not cure-alls. More may be needed.

3. More difficult solutions. If the comparatively simpler "solutions" are insufficient, we may find Congress or the courts forced to turn to other solutions that are more difficult to devise or implement. Let me suggest three sorts.

a. Leave to appeal. In the absence of any further organized effort to deal with the problem, I suspect that the system, on its own, will come to resemble the English appellate system where, in many sorts of cases, the appellate court's permission to appeal is required. This system might prove an appropriate solution to the problems of appellate courts -- though, of course, it does not help trial courts. It is already being instituted, in a limited way, through the medium of opinions from the bench, unpublished opinions, the submission of cases without oral argument, and so forth.

The difficulties of this approach lie not in the idea itself, but rather in the somewhat ad hoc way in which -- without further organized effort -- it is likely to come into being. To what extent does every litigant expect an appeal as of right? What are the costs of openly dispensing with this notion? Are there nonetheless certain sorts of cases, for example, where full appellate argument ought always to be heard? Are there sorts of cases where, say, with permission of the parties, one appellate judge should receive shortened briefs, hear oral argument, and deliver an oral opinion? Which cases now should, or should not, be submitted on briefs alone? What sort of publication policy should the circuits follow? What is the proper role of staff attorneys? To what extent should circuit court staff specifically seek to settle cases? These questions are being addressed individually and under the pressure of events by the various circuits, with the result that one finds uncertainty and sometimes criticism by the bar and the public. Practices differ from circuit to circuit; to the point where one might do better to address the "leave to appeal" question directly.

b. Substantive jurisdictional change. A second difficult approach is to look at the cases in the federal appellate courts by subject matter, changing the jurisdictional rules concerning those sorts of cases where appellate review seems less (or more) necessary. If, for example, a major function of courts (particularly appellate courts) is to create well-reasoned opinions and to expound "the law" -- if this is what they are "best" at -- then one might wonder why such an enormous number of the *civil* cases before us involve no more than a review to see whether the evidence is adequate. For example, about eight percent of our civil filings consist of requests to review denials of applications for Social Security payments. Most of these denials will have already been reviewed four times (by an ALJ, an HHS review panel, a U.S. Magistrate, and a U.S. district court) before they reach us. One might ask whether five levels of review are necessary, effective or even beneficial to the applicant. Similarly, I wonder why so many of our cases involve requests by management to review NLRB findings against them for substantial evidence. At a time when there is strong pressure to remove diversity cases from the federal courts and when numerous "commercial law" cases (where one might have thought the "law guiding" function particularly important) have been relegated to arbitration, perhaps someone -- professor, judicial committee or legislator -- should review the workload of the federal courts with an eye toward deciding which sorts of cases are most effectively decided in federal courts as opposed to decision elsewhere.

If one were to carry this "substantive" approach further, one might ask where and to what extent we should seek to solve social problems through the creation of "rights" or "entitlements" (and hence through the creation of potential legal "controversies"). Other countries that seek to solve similar problems have sometimes been more successful when they sought "non-right-based" solutions. Thus, one can at least ask whether increased direct governmental expenditure might sometimes do more for, say, the handicapped, or for, say, worker safety, than "enforceable" legal rights, for example, against "discrimination" -- rights that may be given in principle but perhaps too often denied in practice. And one can ask whether informal administrative planning involving community groups and nationalized industries (as in Britain) is more, or less, successful in seeing that needed plants are built in a way that minimizes environmental and social harm, than (as in America) providing each affected group with court enforceable legal rights. The subject of more effective alternatives to classical "command and control," "right/duty-based" regulation is one I have explored in detail elsewhere. (Regulation and Its Reform (Harvard Press 1982)).

Even to suggest such an approach, however, is to call attention to its major flaw. Each current substantive right, including related jurisdictional rights, benefits particular groups of people -- often those who most need protection. They will be reluctant to give up what the law now allows them, for the mere promise of some other kind of benefit, no matter whether the promise sounds plausible. Yet, to convince most of those who benefit from the present system of the need for change, as a practical matter, is a precondition of significant change. The only way to succeed with such an approach is, I suspect, to design a package that is viewed as substantively "neutral" -- one that is not seen as favoring one group of potential litigants as compared with another.

4. Incentives. Finally, we come to incentive systems. The object of these systems is to find dollar incentives that will help get the "right" cases into court and keep the "wrong" cases out. They basically seek to make litigants with baseless or weak cases pay more of the costs of litigation, while those that have stronger cases pay less.

The type of incentive now commonly discussed concerns legal fees. The venerable "American rule" -- that each side pays its own legal fees -- is coming into question. And, more favorable words are being spoken of the "English rule," which imposes all legal fees as a cost upon the loser. The English rule has certain "incentive" and "fairness" advantages. If, for example, a plaintiff wins, why should he not recover his legal costs, which are an element of his damages? Why should the defendant not have to pay for the damage caused? A plaintiff with a strong case will be more likely to bring it; and the plaintiff with damages of a few thousand dollars would be able to afford to bring the case. The plaintiff with a weak case may hesitate to bring that case, but is this not as it should be?

The most frequently mentioned "fee-shifting" plan emphasizes these "incentive" aspects. It would combine fee-shifting with Rule 68's "offer of judgment." In essence, either a plaintiff or a defendant could offer to settle a case by paying or accepting a fixed sum. If the other side refused, the case would have to go to trial. Then, if (and only if) the final judgment turned out to be less favorable to the "refusing" party than the offer that it refused, that party would have to pay the other's costs, including attorney's fees. As amended, this rule would provide increased incentive to settle cases. It would move "weak cases" and "strong case" settlements in the right direction; and to that extent, it would allocate more efficiently and more wisely the resources of the federal courts.

Why, then, is there hostility to the English rule? Or at least to this modified version of it? Why has it not been adopted? The traditional problem with the English approach is thought to be its treatment of the plaintiff with a fairly good case who nonetheless fears liability for legal fees if he loses. This "risk averse" plaintiff might pursue his case under present rules -- particularly if he finds an attorney willing to take it on a contingent fee. He might not do so if he has to pay defendant's legal costs should he lose.

Plaintiffs in tort cases may face this problem, as may plaintiffs in § 1983 actions. Indeed, the fact that winning plaintiffs in § 1983 cases now receive legal fees, but winning defendants do not, makes the bar that represents them particularly unwilling to contemplate fee-shifting changes.

The fact, however, that there may be such objections -- even if they are backed by strong reasons and mighty political force -- does not justify abandoning the fee-shifting approach. Indeed, that is my main point. For one thing, the harm that "risk averse" plaintiffs might suffer through fee-shifting will tend to be counterbalanced by the benefit to potential plaintiffs with strong smaller claims, who now are shut out of court. For another thing, no one is quite certain how the risk averse plaintiffs or § 1983 plaintiffs would in fact react to such a change. Empirical work is called for before one can arrive at conclusions.

More importantly, these problems, whether illusory or real, call for tailoring the fee shifting proposals, not for abandoning them. Tailoring a proposal with an eye toward generating consensus is an art at which legislators and their legislative staffs are skilled. And, it is that type of skill that is called for here.

Consider, purely for the sake of providing an illustration, one incentive or "fee-shifting" proposal that would instantly generate strong political opposition. Suppose I suggested reducing the court's workload by making all litigation expenses "non-deductible" for income tax purposes. Although one could argue that the current allowable deduction as "ordinary and necessary" business expenses subsidizes commercial litigation, I imagine that the corporate bar would strongly disagree with any such argument and would strongly oppose any such suggestion for change. Suppose, however, that one modified or "tailored" the proposal as follows: 'Allow a judge to find that, because of the "baseless" or "frivolous" nature of the case or defense, one of the party's litigation expenses was no longer an "ordinary and necessary" business expense and thus was non-deductible.' Leaving aside other practical problems with the proposal, I suspect the corporate world might not oppose it strongly. After all, each corporation might reason: we do not bring baseless cases; baseless cases are what we defend against, so the proposal might help, not hurt us. It is this type of "tailoring" -- designed to meet the various objections and problems of particular groups -- that I have in mind.

There is considerable opportunity for "tailoring" for there are many "dimensions" along which cost-shifting or fee proposals can be modified. One can have "two-way" fee-shifting, one-way fee-shifting, or no shift at all. One can have automatic fee-shifting rules or leave the matter to a judge's discretion. One can have shifting for some parts of a case (say, discovery) but not for other parts. One can have fee-shifting for certain sorts of cases, or certain sorts of plaintiffs, or certain sorts of defendants. One can combine fee-shifting with offers of judgment. One can set ceilings or limits on amounts. The possibilities are nearly endless.

Finally, if it turns out to be too difficult to work out a detailed solution in a legislative forum, the Congress can always delegate appropriately limited power to the Judicial Conference. After all, Congress has trusted agencies -- the FCC, OSHA, NHRSA and others -- with considerably broader delegations of power.

In sum, the overall problem seems serious, and in light of that seriousness, fee-shifting and other incentive based proposals deserve to be taken seriously. They aim in the right direction -- more efficient use of the courts. They have problems, and developing a sufficiently broad "political consensus" of support may be difficult; but it does not seem hopeless. There is considerable work to be done; empirical work to learn from experiences; intellectual work to create feasible variations and alternatives; and political work to develop the necessary consensus. Despite the magnitude of the effort required, the approach seems promising.

STATEMENT OF SENATOR TOM DASCHLE

BEFORE THE COMMITTEE ON

VETERANS AFFAIRS

APRIL 28, 1988

Mr. Chairman, thank you for the opportunity to appear before you today to address the issue of judicial review of decisions rendered by the Veterans Administration. I understand the Committee is focusing specifically on S. 11 and S. 2292.

I would like to begin by discussing S. 11, reviewing the aspects of the bill I deem critical to the fair treatment of America's veterans. I will conclude with my views on S. 2292.

As you are aware, I am a strong supporter of S. 11. The reasons for my support are simple. Veterans of this country deserve the option of having their claims impartially adjudicated if they disagree with the final findings of the VA. In other words, they should have the right to a lawyer and to their day in court.

While the Veterans Administration provides a framework for appealing decisions through the VA's own Board of Veterans Appeals (BVA), veterans are left with no means of review by an impartial body after the claims have been denied by that panel. We acknowledge that right for virtually everyone else in American society -- from Social Security recipients to convicted felons. Not granting this fundamental consideration to those who were willing to sacrifice their lives, their health, and their futures to defend the security and ideals of this nation is incompatible with the promises this government made to its veterans.

Over the years that judicial review has been debated in Congress, I have heard repeatedly how veterans are allowed to resubmit their claims if they disagree with VA decisions. This defense ignores the reality that without new material evidence, the BVA will not reconsider a claim. To the veteran who has already given all his supportive information to the VA, the opportunity to refile an appeal is an empty promise.

The promise was empty for a veteran in Rapid City, South Dakota, who, in World War II, parachuted from his failing aircraft and collided with a brick wall upon landing, leaving one of his legs disabled. He was taken prisoner with other American soldiers. After the war, he spent decades trying to prove the injuries suffered during his fall were service-connected. Although affidavits from fellow veterans who parachuted with him were submitted with his appeal, his claim was denied. Refiling his appeal provided no realistic relief when all pertinent facts had been already supplied.

The promise was also empty for a veteran in Belle Fourche, South Dakota, who injured his back in Vietnam. The VA rated him zero percent disabled, even though he walked with a cane and medical opinion supported the claim that he was totally disabled. When his condition deteriorated to the point that he needed two canes, the VA claimed his disability was still zero percent. And now, as he is told he will be permanently confined to a wheelchair, and his family struggles to make ends meet, the VA claims that he is not disabled at all.

These are not the only examples of questionable decision-making on the part of the Board of Veterans Appeals that have been brought to my attention. And certainly every member of the House or Senate could add their own tragic stories from veterans who have contacted them. If these serious problems have been brought to our attention, the why do they remain unchanged?

Why should these veterans not be allowed impartial review of their claims? What kind of justice is America offering to those who have championed its ideals?

The gravity of this situation should not be underestimated. We are denying our veterans not only the benefits they are entitled to, but also the rights they fought to preserve.

While the Veterans Administration is pledged to care for veterans and their dependents, the agency is not immune from mistakes. None of us are. Mistakes happen. But when mistakes carry such severe impact on the lives of America's veterans, there must be a remedy. S. 11 provides that remedy.

This leads me to consideration of S.2292, which was recently introduced by Senator Murkowski. The efforts of my colleague to bring together those on divergent sides of this issue are greatly appreciated. I do not, however, believe this approach will correct the fundemental integuity in the current system.

S. 2292 allows for judicial review of decisions based on VA rulings, not on the facts of any individual case. The individual veteran whose claim is denied based on a judgment of the facts of his claim is not assisted by this bill. Without an ability to review VA decisions on the facts of individual claims, veterans do not truly have judicial review. The veteran deserves review based on fact, not just on procedure.

There is, however, common ground beneath the two bills being reviewed today. There is an agreement that a problem exists in the manner in which some veterans claims are adjudicated by the VA. There is a consensus that changes are needed. Now we must make sure those changes reach out to the individual veterans who are fighting for benefits to which they are entitled, and give them a chance to gain what is rightfully theirs.

In closing, I would like to leave you with the story of one last veteran. Ronald Back returned from Vietnam with an injury that left him disabled and in a wheelchair. Not only were his appeals to the VA for a 100% service-connected disability rating denied, he was also mistakenly billed for an overpayment of nearly $1,800. During the lengthy process surrounding these mistakes, the VA was advised numerous times that they had ignored the medical facts of the situation. The severe psychological impact the VA's judgment was having on the veteran was also repeatedly noted.

When the notice of the alleged overpayment reached Ronald Beck, he was no longer able to contend with the burden of his disability and a government agency ignoring the facts of his claim. Feeling he had nowhere to turn for help, Ronald Beck took his own life. A few weeks later, the VA sent him a letter acknowleding their mistake, and advising him of his eligibility for benefits.

When veterans' claims are denied, veterans deserve the opportunity to have a neutral body, the court system, review their cases. Veterans deserve access to the same judicial system available to other Americans for redress of their grievances.

Mr. Chairman, I again stress my strong support for S. 11. I hope this hearing marks the beginning of the end of the persistent injustice facing American veterans.

Thank you.

STATEMENT OF FRANK E. G. WEIL

FOR THE AMERICAN VETERANS COMMITTEE (AVC)
BEFORE
THE SENATE VETERANS AFFAIRS COMMITTEE
ON
JUDICIAL REVIEW OF VA DECISIONS AND LIMITATIONS OF ATTORNEYS' FEES

APRIL 21, 1988

Mr. Chairman and Members of the Committee:

The AMERICAN VETERANS COMMITTEE appreciates this opportunity to appear before you and address the important issues of Judicial Review of VA decisions and Limitation of Attorneys' Fees and the related legislation now pending before this committee. My name is Frank E. G. Weil; I am National Secretary of the American Veterans Committee and the Chairman of its Commission on Veterans Affairs and the Armed Services. I served in the United States Army during World War II as a Special Agent, Counter-Intelligence Corps, and am a member of the bar of the District of Columbia and State of New York.

The AVC supports the principle of judicial review of veterans claims, as well as that of lifting the restrictions on attorneys' fees, so as to enable those veterans who wish to, to avail themselves of the services of members of the bar. I have had the privilege of testifying several times before this Committee on this important issue.

The AVC has long been on record in favor of providing judicial review for VA decisions and for raising the limitation on attorneys' fees. Our current policy resolutions on these crucial issues state:

AVC strongly supports repeal of the law which prohibits judicial review of decisions by the Veterans Administration relating to the granting or denial of benefits.

AVC urges that the current $10 limitation on the fee which a lawyer may charge for representation before the Veterans Administration be abolished in favor of a reasonably scheduled fee set by the VA. The amount of the fee should be based on the reasonable value of the services, but not in excess of one-third of the benefits obtained. AVC further believes that consideration should be given to having the government pay legal fees without charging them against the veterans' benefits.

The system of veterans benefits which the Congress has put together over many years helps to fulfill our country's obligation to those who rendered the military service essential to our nation's defense. Indeed, such veterans legislation aids our national strength. However, the Congressional purpose is at times undermined by incorrect actions within the VA when the VA reviews applications for veterans benefits under the VA's "closed system" which has been immune from judicial review since October 17, 1940 (38 U.S. Code §211(a)).

Applicants asserting statutory claims are entitled, in all other types of administrative action by Federal agencies, to seek judicial review when their claims are denied. Veterans and their survivors should also have the right to judicial review. That principle is supported by large numbers of people. It is supported by the American Bar Association. We, as veterans, urge that this right to judicial review be restored to veterans and their dependents and survivors.

The $10 attorney fee limitation was first adopted in 1864 in order to protect veterans from rapacious and unethical attorneys and agents, and was for some decades reasonably fair compensation for the simple assistance, such as preparing application forms, then needed.

But vast changes in our country during the past many decades have drastically altered the effect of the $10 fee limit. For example, in 1880 average wages were $2.20 per day for skilled workers, and $1.32 per day for laborers. In 1909, production workers in manufacturing had average earnings of 19 cents per hour, compared to $9.17 per hour in 1984. Military base pay for all personnel averaged $231 annually in 1865, compared to $12,000 annually in 1983. The suggested attorneys' fee schedule adopted in 1873 by the District of Columbia Bar Association dramatically illustrates the difference in attorneys' fee structure then and now:

Arguing a case in Supreme Court of District of Columbia	$50
Representing a client in a federal circuit court	$25
Representing a client in a police court trial	$10
Preparing a written contract or deed	$10

[The sources of the above statistical data were cited on p. 9 of AVC's brief in the U.S. Supreme Court filed on March 6, 1985 in *Walters* v. *National Association of Radiation Survivors*, No. 84-571, ________ U.S. ________.]

The value of $10 has eroded to a mere fraction of its 19th century worth. Today, unless a lawyer is willing to donate his or her services, the $10 attorney fee limit is an almost absolute prohibition against veterans and their survivors being able to get independent and adequate legal assistance that all other persons have when seeking benefits authorized by Congress.

Furthermore, expert legal assistance is now often quite essential in many veterans benefits cases. The law, regulations, and procedures relating to veterans benefits are no longer simple. New laws with complex requirements and conditions have been enacted, and VA procedures and rules, like those of other government agencies, have become very intricate. Many claims for veterans benefits involve complex factual and legal issues, technicalities of medical causation, and often involve unpublished VA rules and guidelines. Many veterans and their survivors are incapable of handling these complexities. Although the lay representatives of veterans organizations are helpful in simple matters, they do not furnish the legal assistance needed in complex matters. Also, although VA staff help many applicants, the VA proceedings are often adversarial between the applicants and the VA, because the VA staff cannot, realistically, fully act for both the government's interest and a claimant's interest on disputed issues while also acting as judge of the merits of the claim free from judicial review.

A vivid example is the experience of a widow who applied for survivor benefits after her husband, who had served 20 years in the military with decorations for bravery in the Vietnam War, died. The VA denied her claim five times, with only one oral hearing. She was represented by two veterans organizations, neither of which suggested to obtain expert medical witnesses. One of our AVC attorneys was so appalled by the unjust treatment she received that he agreed to represent her pro bono. At a hearing before the Board of Veterans Appeals, the AVC attorney presented four medical experts, and other witnesses and evidence. With this kind of representation, the Board of Veterans Appeals was persuaded of the widow's case, and ruled in her favor. This experience shows how legal counsel can assist applicants for veteran benefits in complex cases, in which most applicants, even with the help of VA staff and lay representatives of veterans organizations, would be incapable of adequately presenting their cases before the VA.

In addition, the major reason Congress enacted the $10 fee limit--namely, to protect veterans from unscrupulous attorneys and agents who were largely unregulated in the 19th century--no longer exists. Legal standards of professional responsibility and conduct were developed in the 20th century which now regulate lawyers' actions and ethics in relation to their clients. These legal standards provide methods of protecting against overreaching of veterans by attorneys that are more substantial, more flexible, and far less drastic than the statutory $10 fee limit which virtually destroys the right to select and use legal counsel to assist veterans and their survivors in obtaining their statutorily authorized benefits.

We would like to turn now to some specific questions regarding how judicial review would work. Addressing proposed §4026, Scope of Review, in S.11, in (a)(1)(D), we believe that the limitations on review of material facts are too strict. While we agree that ordinarily facts should not be reviewed *de novo*, the language in (D) requires a standard which is too high. We suggest rewording this provision at least by deleting the word "utterly" in line 10 and "grievous" in line 11.

Regarding the suggestion in Senator Cranston's letter of April 5, that judicial review be provided directly at the Court of Appeals level, we are not opposed in principle. We are concerned, however, that courts of appeal do not generally consider facts. We would suggest that if this option is followed, an appropriate mechanism be developed for fact-finding, such as appointment of masters or remand to the District Court in those cases in which fact-finding appears to be necessary.

Finally, we wish to emphasize our firm convictionthat 'judicial review' for veterans is long overdue. The VA is the only administrative agency dispensing billions of federal dollars to citizens which does not provide judicial review of its decisions. To deny veterans and their dependents and survivors the right to appeal a VA decision to the courts seems to us to be violation of a basic Constitutional right and a denial to a large group of American citizens of due process. We believe that veterans should have the same constitutional guarantees in dealing with the VA as other citizens have in dealing with every other government agency. It is discriminatory towards veterans as a class that they are excluded from the protections of judicial review.

The present situation that currently exists whereby the Veterans Administration's decisions regarding claims are final and binding, denying veterans the right that all other citizens have--the right to go to court for redress--is an injustice that calls for reform. It is unconscionable that this situation which penalizes veterans and their survivors has been allowed to continue to this day. We urge this Committee and the Congress to pass legislation for judicial review this year that will return 'first-class' citizenship to America's veterans and their survivors.

Thank you, Mr. Chairman, for the opportunity to present the American Veterans Committee's views to this Committee.

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**NATIONAL ASSOCIATION OF
RADIATION SURVIVORS**

TESTIMONY BEFORE THE SENATE VETERANS AFFAIRS COMMITTEE ON SENATE 11

TO: Committee Chairman Alan Cranston and Members of the Senate Veterans Affairs Committee

SUBJECT: NARS Testimony on Senate 11 Provisions for Judicial Review

DATE: April 20, 1988

My name is Dorothy Legarreta, Ph.D., and I am the elected President of the National Association of Radiation Survivors, or "NARS", a 6,000 member national advocacy association for atomic veterans and civilians injured as a result of their exposure to radiation from nuclear weapons production, testing, or clean-up. NARS has been on record since its inception in 1982 as supporting Judicial Review of Veterans Administration (VA) claims denied at the Board of Veteran Appeals level. We simply hold that the rights guaranteed all citizens in our Constitution, such as the right to due process and the appeal of an unfair decision, should be extended to all disabled veterans and their surviving dependent families.

I will not detail here the recent Congressional history of Judicial Review, as others, such as Phillip Cushman of "Veterans Due Process" have given clear and compelling testimony on this aspect of the issue. Today, with Cabinet status near for the VA, many of us believed that Judicial Review would surely be part of such elevation of this agency. We urge that this civil right of disabled veterans will not continue to elude them.

In place of offering testimony on the above issues, I will detail instead certain findings of our class action lawsuit, NARS v Turnage, which was recently heard in the Ninth District Court in San Francisco. I believe the pattern of VA misconduct in this suit makes obligatory not only a full investigation of this agency, but the immediate passage of Senate 11, with Judicial Review sections intact, and a reasonable attorney fee schedule.

As most of the members of Congress concerned with veterans affairs are aware, the misconduct by the VA both in trial preparations and at trial were such that sanctions totalling over $145,000 were assessed against the agency, and a Special Master was ruled necessary to monitor the VA's compliance with discovery requests by NARS via its pro bono attorneys. The specific types of misconduct included the following, as noted in the findings of Federal Judge Marilyn Hall Patel prior to trial or in sworn Court documents:

1) The VA shredded thousands of documents relevant to the NARS action, including audit reports of due process violations in its regional offices, error rate reports, and other documents requested in discovery.
2) The VA filed an extended series of what Judge Patel termed, "distortions, misrepresentations, and misleading information" over a period of four years. Perhaps the most egregious was the VA's sworn statements that it did not possess the means to track radiation claims, when two computer systems (SIRS and PIF) were in place to do just that.

3) The VA withheld documents specifically requested in discovery requests, such as internal memoranda and reports which criticized the VA procedures and decisions, in what Judge Patel wrote was "deliberate recalcitrance" and a "callous disregard for the lawful processes of the Court".
4) The VA harassed, threatened and punished three of its officials at the Central Office here in Washington who told the truth.
5) During trial of NARS v Turnage, the crucial information regarding radiation dose received by the claimant, as furnished by the Defense Nuclear Agency (DNA) contractors, was proved to be manipulated to ensure a dose below the five Rem amount, arbitrarily and illegally used as a cut-off for benefits.
6) The VA accepts an error rate of some 14% at certain regional offices in the adjudication of claims.

In addition, the VA was unable, until well into trial, to discern how many radiation claims, of the over 9,000 filed, had been granted. A final figure of 37 claims total seems to be the final count. In addition to the five Rem cut-off employed, it also was disclosed that Hiroshima/Nagasaki veterans claims are automatically denied, along with those with the DNA dose below five Rem.

Material from the two computer systems utilized by the VA was also illuminating, and provides a profile of the typical atomic veteran. He is typically in his late fifties or early sixties, with an income over 40% of the time under $10,000, and with medical expenses 30% of the time of between $10,000 and $20,000, a crushing burden. The median income overall for an atomic veteran with a VA claim and his spouse was $809. per month. The educational level of a typical atomic veteran is less than eleven grades of school.

Perhaps the most telling statistic from the VA's own computers was that, of a scientifically-selected random sample of 674 VA radiation claims, 196 had one of the radiogenic cancers specifically ruled as "radiogenic" under the 38 CFR regulations promulgated in 1985. However, in spite of suffering from a cancer deemed radiogenic by the VA, only SIX had won compensation. In fact, the rate of winning a radiation claim has plummeted to ONE PER THOUSAND since the regulations were adopted!

Earlier testimony before House and Senate Committees on the actual adjudication practices of the VA detail a wide range of corrupt practices contrary to VA regulations. These include the use of arbitrary production quotas, production bonuses for Board of Veteran Appeal (BVA) members, the practice of "top-sheeting" where only the first page of a veteran's claim is noted, the "courtesy sign-off", where BVA members sign a decision without having read it, BVA hearings as short as twenty minutes, and identical VA claims to those granted,denied, as no decision is precedent-setting. The National Academy of Public Administration has noted that the VA has not been thoroughly examined in four decades, and recommended such a process. NARS joins in this recommendation.

In closing, I want to note that the pending legislation to compensate atomic veterans presumptively for certain cancers will assist fewer than one-third of the cancers our members report, and overall, fewer than 8% of our atomic veteran members. A system of Judicial Review is essential as a remedy for documented high-exposure atomic veterans suffering from other cancers and radiogenic diseases not covered in pending legislation.

Thank you.

Dorothy Legarreta

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* NARS v Turnage challenges the $10 attorney fee cap in VA claims.

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BEFORE THE UNITED STATES SENATE
COMMITTEE ON VETERANS AFFAIRS

April 28, 1988

TESTIMONY ON JUDICIAL REVIEW

Mr. Chairman, we thank you for this opportunity to testify before this Committee, being the first time we have been afforded the opportunity to come before Congress to make a presentation on this issue.

The National Vietnam Veteran Coalition is a federation of approximately 45 Vietnam veteran and veterans issues organizations. The estimated underlying membership of these organizations is estimated to be in excess of 200,000.

The Coalition was first organized in 1983 in an effort to unify the fractionalized Vietnam veterans organizations around common concerns. One of the eight issues around which unity became feasible was support for judicial review of VA benefits decisions.

Our system of government has placed a great value on both legal due process and upon the right to counsel. Under the circumstances, we find it difficult to understand that veterans should be denied the right to appeal an adverse arbitrary and capricious benefits decision into Federal Court, in contrast to prevailing practice in virtually every other form of administrative adjudication. Likewise, with the ten-dollar fee limit on attorney representation constituting an effective bar to nearly all attorney representation of veterans, the right to representation by counsel is not present. If a person desires to be represented by counsel in this country, he should have that right.

The adjudicators at the Veterans Administration are human beings. As such, they are subject to the foibles and weaknesses of any other human being. We have no reason to believe that the adjudicators at the Board of Veterans Appeals or its inferior bodies are any better or any worse, more rational or less rational, than the decision makers in any other administrative body. We would defy anyone to produce an example of an administrative agency in this country which boasts an unblemished record, which has not been overruled by a Court. Therefore, any aggrieved veteran should have the same protection which is afforded to those seeking relief in comparable arenas.

The ability of the Board of Veterans Appeals to render quality decisions is being seriously impacted as a result of budget cuts, attrition of seasoned personnel and staff overwork. This has been well documented in two hearings before the House Subcommittee on Compensation, Pension and Insurance on May 7, 1987, and October 6, 1987, respectively. To quote just some of the observations in those hearings by opponents of judicial review:

- "The VA's emphasis on end products, as well as production standards, negatively affect quality."

- "The adjudication staffs are already working at their peak, morale is falling and in most cases there are not enough personnel . . . . The VA cannot expect their adjudicators to continue to push out large quantities of decisions without affecting the quality of these same decisions."

- "many [service officers] expressed a recurrent complaint of rating boards or adjudicators denying complex claims rather than undertaking additional development. The reason given (informally) was 'let Washington do it.' There was a fear of criticism by VA Central Office."

The VA system thus offers a high potential for arbitrary and capricious decisionmaking, regardless of whatever best efforts may be made to cure the deficiencies. Why then should an innocent disabled veteran be denied the right to appeal an arbitrary and capricious decision?

We would offer an additional argument. It is an open secret that far too many grass-roots Vietnam veterans are very estranged from the Veterans Administration, even to the point of regarding the VA as an enemy. This perception, fair or unfair, has been privately acknowledged to us by high-ranking VA officials. Enacting judicial review would contribute to a new perception of fairness in the system.

Next, we turn to the arguments against reform in this area. First, it is contended that effectively permitting lawyers into the system would be to the detriment of veterans who, under present informality, receive the benefit of the doubt. Assuming the assumptions underlying this argument to be valid, the answer is that lawyers are unlikely to enter the system in any great numbers.[1]

This prediction is grounded in the realities of legal economics. And here I speak as a practicing lawyer. Two key considerations govern here: first, the $500 fee permitted under S11 is not likely to be all that attractive to a lawyer -- if we assume a minimum billing rate of $75 an hour, any lawyer who devotes even seven hours to a case has lost a bit. Therefore, the maximum 25% contingency fee provided for in S11 will be the attraction to the attorney; what this means, in turn, is that an attorney will only be willing to take cases which offer the prospect of victory. The allowance rate at BVA is very low--less than 15%. Every service officer with whom we have spoken feels that the overwhelming majority of claims adjudicated at the BVA level lack merit.

Further, the service officer is an alternative to the attorney. We find it difficult to believe that the average claimant, faced with a choice between retention of an attorney who charges a significant fee and a service officer who provides a free service, will opt for the attorney representation. We may also safely assume that, once attorney representation becomes a reality, both the Veterans Administration and the veterans service organizations will increase their efforts to promote awareness of the service officer alternative.

The second major argument against judicial review--overcrowding of the federal courts -- founders on these same economic realities. Only winning cases will be selected for appeal. Further, if indeed there will be enough cases to constitute overcrowding, we submit that this would be a serious indictment of the Veterans Administration for having handled so many cases improperly in the first place. And if the situation were indeed so bleak, we must ask, why should the innocent disabled veteran be made to suffer, and the veteran's attorney blamed?

We have another reason for believing that overcrowding will not take place. The branches of the armed services conduct their own disability retirement system, from which appeals to Federal court are permitted. The Department of Defense Office of the Actuary, as of September 30, 1986, listed 138,773 living retirees receiving disability pensions. This is a rather sizeable program. Yet, when we requested statistics on lawsuits filed by disaffected claimants, we were advised that there were no statistics. We infer from this absence that legal challenges to DOD adjudications are rare, despite the fact that awards are more sparingly granted at DOD than at VA (254,707 retirees deemed non-disabled by DOD -- nearly 25% of all retirees -- received VA disability, as of September 30, 1986).

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[1] Section 401(c) of S11 would retain the $10 fee cap until a final decision of the Administrator is first rendered. This would considerably reduce the prospect of entry of attorneys into the system. However, the theoretical prospect is regarded as important, both by supporters and opponents of judicial review.

We also hear the argument that legal fees to attorneys will drain money from the veteran's pocket. This argument is valid only to the extent that the veteran's claim would have been resolved successfully without the participation of an attorney. Otherwise, the economics are the same as they would be for an automobile accident victim, an unpaid subcontractor or any other type of claimant -- 75% of something is better than 100% of nothing.

Another argument which has been made is that, given the ability of a court to scrutinize an adjudication, VA will resort to defensive record-building, that its pro-veteran stance will be modified in various ways. Apparently, however, this has already happened. In his testimony before the House on October 6, 1987, VA general counsel Donald L. Ivers noted that the combination of "increasing involvement by the federal courts in the procedural aspects of various administrative claims-processing functions" and "criticisms voiced by proponents of judicial review" was a factor in the growing percentage of remands from BVA to the regional offices. However, he identified these concerns as representing only one of five factors which are contributing to the increase in remands. In the aggregate, there are perhaps 5,000 more remands a year than four years ago. Allocating the five factors evenly, judicial review becomes responsible for about 1,000 cases a year -- on impact of less than 2% on the system.[2] And certainly, to the extent that a benefits denial must be supported by the record, a reasoned denial -- resulting from "defensive record building" -- is preferable to an unreasoned denial.

Another factor contributing to delay listed by Mr. Ivers in the aforementioned testimony was that "veterans service officers and other representatives are becoming increasingly effective as advocates on behalf of VA appellants." This contention leads us into the paradoxical nature of the positions adopted by the opponents of judicial review. On the one hand, we are told that the procedures are informal and pro-veteran; on the other hand, we are told that advocacy skills -- not noticeably needed in a truly relaxed, pro-veteran environment -- are improving

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[2] Given that the success rate on remand is approx. 20%, we can estimate the spectre of judicial review has resulted in about 200 veterans receiving benefits who would not otherwise have received them.

(resulting in remands rather than denials). On the one hand, service officers are effective representatives, even more so than attorneys would be; on the other hand, the fear exists that the less-skilled, more expensive attorneys will drive their superior competitors out of business. On the one hand, the VA claims system is extremely well-managed and provides satisfaction to most claimants, thus demonstrating the lack of necessity of reform; on the other hand, reform will result in an glut of suits in Federal court.

Before turning to the two bills before this Committee, S11, introduced by Senator Cranston, and S2292, introduced by Senator Murkowski, we have been requested to discuss the merits of judicial review at the Court of Appeals level versus the District Court level. S11, with its provisions for fact review, makes the District Court, a fact-finding body, the more appropriate forum. S2292, with its provisions for exclusive law review and its unusally powerful BVA is more appropriate for the Court of Appeals.

S11, as should be apparent by now, in most essentials achieves the result we are seeking. We would prefer that decisions by BVA which are subject to challenge (Section 502) include decisions from earlier years than 1987; we feel that some of the provisions of S2292 could be beneficially incorporated into the bill, as will be discussed. We can quibble about other provisions.

We do have two primary concerns about this bill. First, the scope of review at Section 4026(a)(1)(D) is narrow ("so utterly lacking in a rational basis") and not in accordance with the "arbitrary and capricious" standard employed in administrative practice. While we recognize that the committee is under pressure to produce a bill that is acceptable to enough factions to pass Congress, we are concerned that this provision has the potential to undermine the intended reform. Our second concern is that the fee structure envisioned in the bill is subject to approval by the Administrator (Section 401(c)); in view of the hostility to lawyers expressed by the opponents of judicial review, the danger exists that "reasonable fees" could be defined so as to discourage attorney participation on reconsideration or re-opening of a claim. We hope therefore that tight scrutiny and oversight is directed towards administration of this provision.

S2292 contains several desirable features, which might well be incorporated into S11, most notably: its provision for legal fees within the VA system, thus permitting effective entry of attorneys into the VA system; and deletion of the requirements of

Section 4004(c), binding BVA to the VA regulations,[3] instructions of the Administrator and the precedent opinions of the chief law officer. (We assume that granting judicial review from Section 4004(a) BVA decisions in S11 is sufficient to embrace the essence of the S2292 proposal for judicial review of VA regulations.)

Where we part company with the bill is its rejection of judicial review, under any circumstances, of fact decisions. Also, we would respectfully suggest that proposed Section 4010(b) - separating review of law and fact issues - will not work where they are intertwined with one another. Moreover, even if the administrative reforms proposed in Senator Murkowski's statement accompanying his bill do take hold, claimants will be denied relief nonetheless during the interim. The effort to create a stronger BVA would provide us with a specialized court, which will predictably become petrified in the rigidity of its outlook. It has been said that war is too important to be left to the generals, which is another way of saying that specialists must always be subject to the oversight of generalists.

For the reasons stated, we believe judicial review is necessary. To reach this conclusion, we need not reach the more serious allegations of mismanagement and misconduct within the Veterans Administration, most notably the data which has emerged from the NARS lawsuit. If these allegations more closely represent the total reality of the VA system than do the perceptions of the major service organizations, then the need for judicial review becomes still more compelling. We hope to see the U.S. Senate pass judicial review for the fourth time in a row. Thank you.

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[3] While changing this subprovision of the law would be inconsistent with administrative practice, regular administrative practice bifurcates litigation between administrative bodies powerless to correct obvious errors in regulations and the federal courts who possess such power, thereby adding to the overall burden of litigation. On balance, a disabled veteran already suffers enough without bearing this further burden.

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Date: April 14, 1988

Written Statement of:

Veterans Due Process, Inc.

Prepared by:

SIDNEY COOPER
National Legislative Director

Submitted to:

UNITED STATES SENATE
COMMITTEE ON
VETERANS' AFFAIRS

Concerning

S. 11

To provide Veterans with Judicial Review and access to an attorney, at reasonable expense.

For Hearing of April 21, 1988

Table of Issues

Subject	page#
Who Speaks for Veterans ?	1
Entitlements vs Gifts	2
Historical Perspective (short form)	2
Quota System of Dispensing Justice	3,4,5
Potential for Abuse	5
Veterans Administration's 27 Unfair Practices	6,7,8
Damaging Testimony : Repeatedly Ignored by Congress	8-12
Eggregious Cases	13-16
Truth in Recruiting : Requirement to Warn	17
Implausibility of NVSO Arguments against Judicial Review	18-20
Is Mississippi, the Promised Land of VA Benefits ?	21
American Legion Financial Secrecy Act	22
VA Blackmail Letter and Relevant Facts	23,24
Summary	24-26

Veterans Due Process, recognized by the American Bar Association, The National Law Journal, Stars & Stripes, among others as the leading "independent" veterans civil rights organization, is pleased to be accorded this opportunity to testify in favor of judicial review.

Who Speaks for Veterans on the Issue of Judicial Review ?

We speak for virtually all of the twenty million veterans not currently represented by National Veterans Service Organizations (NVSO's); and for many, if not most, of their (NVSO) members whom we believe to have been disenfranchised and/or ignored on the issue of judicial review. Simply put, in the name of the overwhelming majority of veterans and their dependents, we demand our right to a day in court; to retain an attorney of our choosing; and to the restoration of our first class citizenship rights.

Senators ask yourselves, did veterans fight wars to make the the world safe for the bureaucrats at home ? Did we risk our lives to protect everyone else's constitutional rights at the expense of our own ? Did we willingly accept the loss of our constitutional rights or was that taken from us in the middle of the night while the Press yawned; the ABA slept ; the ACLU shrugged ; the Congress procrastinated ; and our NVSO's sold us out on a cross of free services aggregating millions of dollars ? **Blackmail !** the Wall Street Journal reported. We call it betrayal.

Ask yourselves, how many veterans would support their NVSO leadership's position that compensation received for war injuries was nothing more than gifts ? How many veterans would knowingly accept the proposition that welfare recipients receive entitlements while veterans receive only gifts ? How many veterans would knowingly accept the fact that spies, traitors and criminals have more legal rights than they do ? How many veterans would knowingly favor hoodwinking youngsters into our armed services and then, if injured, deprive them of their constitutional rights ?

Under such circumstances, how could the Congress believe that the NVSO's represented their members on the critical issue of judicial review !!? Further, how could Congress believe that veterans would support issues so contrary to their best interests ? More importantly, how could Congress permit such outrages against veterans or any citizen of this country ? Veterans have been kept in ignornance of their leadership's betrayal, what excuse does the Congress have ?

Entitlements versus Gifts

If Congress has any doubt over the NVSO leadership's position on the issue of gifts, ask them whether they would support a sense of the Congress resolution designating veterans benefits, as entitlements ? If they accepted, and Congress agreed - we could all go home and judicial review would be a reality. Congress need do nothing more. The Courts would do the rest.

An enormous legal distinction exists between gifts and entitlements. Welfare (entitlements) are accorded the full due process protection of the courts while veterans (gifts) are denied similar protection. Consequently, bureaucrats tred softly on welfare recipients' " entitlements " while it's open season on veterans (gifts) which are subject to the whims and caprices of bureaucrats operating under rules, regulations and operating procedures which are demonstrably unfair; and from which, there is no appeal.

Historical Perspective (Short Form)

The right to petition the courts for redress of just grievances is a basic and fundamental right of all Americans. Yet this right is routinely denied American veterans. If the Veterans Administration (VA) says it's night despite the fact that it may be day, there is not a power on earth which can cause that Agency to change its decision, once it has been made. For example, a veteran could obtain expert witnesses, the most learned academicians and scientists, but nothing could prevail against a Board of Veterans Appeals (BVA) decision.

Why is it that veterans are denied the right to judicial review or their day in court when they feel unfairly treated by the VA administrative process ? Congress when it passed U.S.C., Title Law # 38, believed that veterans would be treated so fairly that legal remedies would not be necessary. Moreover, Congress further believed that the " unscrupulous legal profession " should be excluded from participating in veterans claims awards, limiting attorney fees to ten dollars. To insure compliance, Congress imposed jail sentences of two years at hard labor and fines for attorneys accepting fees in excess of ten dollars.

Veterans denied adequate legal representation and the right to have claims litigated on their merits in a court of law - were soon fair game for bureaucrats with competing interests, primarily their own. Budgetary considerations, empire building, promotion, monetary awards, and undisclosed interests harboring secret agendas supplanted fairness and justice at the VA.

Quota System of Dispensing Justice

Veterans stripped of their constitutional protections were consigned to the mercy of unfair VA administrative practices and procedures without legal redress. **Routinely,** VA practices deny veterans personal hearings, subpoena power, expert independent medical testimony, access to medical files, records and regulations, the right to cross examine, etc. Meanwhile the Agency maintains the integrity of its quota system (12.7 % allowance rate, year after year with little change) subjecting veterans to conflicts of interest, frustration, bias, intimidation, incompetence and worse.

Annually the Veterans Administration publishes information re: the awards that veterans receive with respect to their Board of Veterans Appeals (BVA) claims, which approximate between 30,000 and 40,000 each year. The most recent 12 year results are shown, as follows :

	Year	Success Rate
1.	1976	12.7%
2.	1977	12.7
3.	1978	12.5
4.	1979	12.7
5.	1980	12.4
6.	1981	12.4
7.	1982	13.0
8.	1983	13.7
9.	1984	13.8
10.	1985	13.3
11.	1986	12.8
12.	1987	12.9 (3 qtrs.)

note : Even the 13 % average rate of success is a myth, bad as it is. Veterans fare much worse predicated on recent VA correspondence acknowledging that " if, in a four issue appeal, three issues are denied and one issue is allowed, the VACOLS record will regard the BVA decision as an allowance."

Such relatively constant results could be achieved only via the imposition of a quota system of dispensing justice. For the years of 1976-1981, the laws of probability would make the odds of obtaining success ratios in such close proximity year after year, as being over a trillion to one. Much more, if we were to include the remaining years.

The statistics while not wholly dispositive of a quota system, do however, provide a statistical basis for making that assumption. It must be recalled, that while there is no scientific or medical link between cigarette smoking and lung cancer- there is statistical evidence to suggest its validity. In this instance, the statistical evidence is overwhelming. How could such statistics be anything but indicative of a quota system ? What other possible explanation is there ?

Startling, was then Associate Supreme Court Judge, William Rehnquist's observation in the NARS case, that it didn't seem to make much difference who represented veterans since all of the NVSO's, the American Red Cross, agents, attorneys or those self represented seemed to fare equally well. Probably, a chimpanzee would too - under a quota system. Obviously, the Judge did not understand that he was looking straight at a quota system where everyone gets their fair share under the " quota umbrella ".

From all of the available evidence, it is absolutely clear that the VA monitors the numbers and types of claims awarded. For example, when it was deemed that Puerto Rican veterans were obtaining 100% disability (PSTD) claims in excess of the national averages, immediate steps were taken by the VA to remedy the perceived excesses - irrespective of how harsh or unjust the remedies were. Similar evidence was obtained during the early NARS testimony from a VA employee concerning other perceived excesses which immediately triggered a Central Office investigation and remedial action.

Incredibly, no evidence is available indicating that the VA took remedial action where veterans benefits appeared to be substantially below the national averages - only over, the averages. There is one exception, however - pertaining to veterans residing in Arkansas and Mississippi - where huge, unexplained, over the national average, disparities in benefits awards exist. (more later).

The Board of Veterans Appeals, (BVA) in furtherance of its quota system, has adopted unusually creative (immoral, unprofessional, possibly illegal) practices to include : panel expansion (court packing or deck stacking), panel (court) shopping, courtesy decisions (signing off on decisions, not examined), productivity (not quality) awards, and other surreptitious practices to sustain their 87.3 % denial rate. The VA approves of these practices, on the premise that it is safer to deny than approve claims.

Although the VA vigorously denies that it has a quota system, the evidence is irrefutable. So what if they call it economic prudence control or damage control or claim control or some other egually disingenuous bureaucratic name. Would a rose by any other name, smell half so sweet ? Would a wolf in sheep's clothing, be anything but a wolf ? If it looked like a duck, walked like a duck and quacked like a duck, what would it be ? **A quota system !**

Interestingly, the Washington Post reported in an article published March 13, 1988 that a number of government agencies and private businesses operate quota systems, but strenuously deny their existance. The New York City Police department, the IRS, Newspapers, etc. So the VA's denial of the practice is not that unusual. No one wants to admit what many practice and wish to keep secret and away from public attention. For that matter what government agency would willingly acknowledge justice by quota ? So the VA doesn't have a quota, what's new ?

Potential for Abuse

The Veterans Administration has been uniquely placed above the law by ill considered and " unconstitutional " laws which insulate its decisions from judicial review. Moreover, it vigorously asserts, that it needn't account to anyone for its actions or procedures.

Recently, the VA went so far as to declare, pursuant to a hypothetical question framed by a Circuit Court of Appeals Judge sitting , en banc, - that 211 (a) barred court jurisdiction of VA practices even if womens' (veterans) claims were denied solely on account of gender !!? The constitutionality issue being contested is still under review by the Court, no decision having been reached. In still another case, the VA cited 211 (a) as a bar to court jurisdiction over an allegation of racial bias ? Is this what Congress intended ?

Emboldened by such perceived unrestrained license, the VA - after fifty-five years, has clearly run amok with unbridaled power. The potential for abuse under such circumstances would not have surprised Lord Acton who concluded that : " Power corrupts, and absolute power corrupts, absolutely ! " It should not now surprise the Congress that the VA (its creation) claims more power than the Congress has to bestow.

Veterans Administration's 27 Unfair Practices

The Veteran's Administration (V.A.) has subjected veterans to unfair practices and procedures for the express purpose of maintaining the integrity of their quota system of dispensing justice. In the process thereof, the V.A. has adopted **unusually creative, deceitful and cunning practices** designed to cause veterans to abandon perfectly valid claims in utter confusion, anguish and frustration- overcome, by a deep sense of betrayal. Practices so unfair, that in their **totality** serve to **deny** veterans a **fair and impartial hearing.**

Enumerated below are but 27 of those unfair practices- either engaged in or supported by the V.A.- in **collusion** with the American Legion, VFW, DAV :

1. No right of **judicial review** or to have their claims litigated in a court of law based upon their individual merits- irrespective of how arbitrary or capricious V.A. decisions may be.
2. No right to **retain an attorney** in V.A. claim actions. Attorneys who accept more than ten dollars are subject to **imprisonment for two years** at hard labor and a five hundred dollar fine. Under such circumstances, no attorney will pick up the phone today- much less represent veterans for ten dollars.
3. No right of **subpoena.**
4. No right of **cross examination.**
5. No right of **independent appeal.**
6. No right of **independent medical testimony** to resolve differences in medical opinion.
7. No right to compel V.A. to **address** or confront **evidence**.
8. No right to copies of V.A. **regulations** utilized against them.
9. No right to **discuss case** with the V.A.
10. No right to obtain **answers to questions** whether written or oral.
11. No right to **investigate** or explore reasons for **missing files** or records which could prove beneficial to claimant.

12. No right to **personal hearings**, despite regulations to the contrary.

13. Claims are often denied for failure of veterans to **answer correspondence** which was **never sent.**

14. Inordinate **delays in answering correspondence-** often replies take three months and more.

15. **Responses** are often vague, obtuse and couched in bureaucratic language **devoid of meaning.**

16. **Questions** which are deemed repetitive, are **not answered-** despite the fact- that no answers were forthcoming previously.

17. Little or **no assistance in developing claims** is provided veterans despite voluminous Congressional testimony to the contrary.

18. V.A.'s version re: recitation of the facts is **always accepted** contrary to any evidence introduced by the veteran contradicting their alleged facts.

19. In a rush to judgment, V.A. often **renders decisions** without benefit of the service or medical records and **without any facts** bearing upon the merits of the claim.

20. **Hearings** are often held **without notification** to the veteran. A check mark, denoting some unnamed Veterans Service Officer's presence, is the only indication that some representation was afforded the veteran. Often the hearing record fails to disclose whether the alleged representative said or did anything in the veteran's behalf.

21. After hearings are conducted, **decisions** are often rendered **by personnel not present** at the hearing.

22. V.A. **employs 800 attorneys** to represent the government's interests, but the veteran is **not entitled** to any meaningful legal representation.

23. V.A. rules, regulations and operating procedures are **complex,** confusing, contradictory, voluminous and subject to **constant change.**

24. On occasion, unqualified or **incompetent Doctors** are hired- and placed into sensitive positions requiring them to render **medical judgments** at the speed of one or two per minute. Often such medical personnel are unable to secure employment elsewhere and consequently, **easily intimidated** - into accepting V.A. requirements for " agency favored medical opinions ".

25. Veterans are not granted the **benefit of the doubt** despite rules, regulations and sworn testimony to the contrary. Many times, there isn't a doubt, but still claims are denied.

26. In a desire to deny claims, the V.A. often **invents medical theories** out of whole cloth. Such theories, usually **defy** past or current **medical wisdom** or any likely thereafter.

27. Claims before the Board of Veterans Appeals are **successful in only one of eight claims.** The allowance percentage rate of 12.7 % **never seems to vary** much over the years - no matter how many claims there are- usually, 30,000- 40,000 per year. The percentages which are in such close proximity year after year strongly suggest the **imposition of a quota system** of dispensing justice.

Moreover, it **doesn't seem to matter** who represents a veteran- whether the American Red Cross, the American legion, VFW, DAV, self, attorney (pro bono) - the failure rate of 87 % remains constant.

Damaging Testimony: Repeatedly Ignored by Congress.

The Congress on numerous occasions was confronted by testimony critical of the VA's handling of veterans' claims- but, each time did little or nothing to investigate or meaningfully inquire into the shortcomings and deficiencies reported. For example:

1. **Mr. Kenneth Blaylock,** Pres. of the AFGE with 116,000 VA members testified on pages 330, 331 of the November, 1980 HVAC hearing book, as follows :

   a) **Considerable dissatisfaction** exists among our membership concerning the lack of judicial review.

   b) Veterans have been relegated to **second class** citizenship.

   c) A **demonstrated need** exists for the VA to be subject to judicial accountability.

   d) **Available figures** indicate that veterans making an appeal to the BVA are under a serious disadvantage.

   e) **Large numbers** of veterans do not appear to have been granted the benefit of the doubt on any consistent basis.

   f) **Informality** combined with the absence of precedence leaves wide discretion for inconsistent and uncontrolled decision making.

g) The **absence of court review**, precludes any effective institutional check on arbitrary or impermissable action.

Inexplicably, no member of the Congress, to our knowledge, asked Mr. Blaylock for the source of his information or what evidence he had to support these allegations. Obviously, it must have come from his union members, what other sources could there have been ? Mr. Blaylock would not talk to us, perhaps the Congress will now pursue his important testimony.

2. **An ex-BVA employee**, Norman Johnson wrote to Senator Alan Cranston on October 11, 1977. That letter was introduced into the November, 1980 HVAC hearing testimony. Highlights of Mr. Johnson's testimony follow:

a) **Mr. Johnson said** that he was required to " shelve my notions of professional objectivity and procedureal due process".

b) **Learned** that there was a covert quota system in effect.

c) " **Job performance** was rated by the number of decisions written in a given week. .....each week a tally was circulated to all personnel showing the number of decisions produced by each attorney and for each of a dozen or more sections of the Board. There was clearly a competiveness..."

note: Mr. Johnson wrote the above in 1977. Today the same things are being said by VA employees, Messrs. Abrams, Boscovitch, Kinney, Deep Throat, Wright and Biderman et al. In fact hundreds of VA employees would be willing to spill their guts, if only Congress would ask them a question !

d) " **Inconsistency of decisions** is a major shortcoming of the Board and its processes."

e) " **case decisions** were haphazard, unfair and probably illegal ".

f) **Specifically**, denying claims " for service connection where the service department could not produce any medical records. This was not an infrequent problem, and surely many valid claims were refused on these grounds. To cover the situation and the embarrassment of the loss of the records, the opinion would recite something to the effect : [" Service medical records do not indicate treatment for claimed injury. "] Such evasion was common in cases where there simply were no records. "

note: Yet, another example of disengenuous bureaucratic gamesmanship practiced on helpless veterans.

g) " **A number of proferred decisions** were reversed by the section chief because the facts were not overwhelming and the veteran's records showed infractions of military discipline, even minor ones. "

note: What happened to benefit of the doubt consideration standard mandated by the Congress ?

h) " **Biases** and individual standards of panel members affected the decision - and would differ from one section to the next." (so much for uniformity in decision making)

i) " **On questions** of permanent and total disability claims, my section was tight. When the facts were close, the decision always went against the veteran, although the statutes mandate a liberal interpretation."

j) **Some decisions** were based upon racial considerations.

k) " **Veterans deserve** equal and fair treatment and they will not get it until the current scheme is opened to review on an independent judicial process. "

Neither the Congress nor anyone else sought to question Mr. Johnson concerning the validity of his remarks. Today, there is substantial corroborative information to support much, if not all, of Mr. Johnson's testimony.

3. **Mr. Donald Schwab**, of the VFW in testimony given before the HVAC, November 19, 1980 , on pages 290, 291 of the hearing book was highly critical of the VA, complaining - as follows:

a) " **a system** which permits welfare or supplemental security income recipients to seek court relief but denies the same forum to veterans is flawed. "

b) **Many veterans** believe " that they have not received timely, full, fair and impartial consideration of their appeals. "

c) " **In the absence** of substantiating service medical records " buddy statements " by former prisoners of war and other knowledgeable witnesses are nearly always discounted, as having been made from remote memory. "

d) " **One of the most** frequently heard complaints .... is the complete frustration of those whose claims have been denied due to 38 USC 211 (a)."

e) " **Many service officers** are increasingly disappointed in the denial of cases which have considerable merit. Also,they wonder why, over the past eight years, the percentage of cases allowed by the Board of Veterans Appeals has fluctuated only a little over 2 per cent whether that body considered 25,000 cases in the year or more than 35,000 cases. The average allowances have been 12.8 per cent of the cases considered. In the last four fiscal years, the variance has been only two-tenths of 1 percent in that allowances in 1976, 1977, 1979 were 12.7% and in 1978, 12.5 %, in 1980, 12.4 %. "

note : The allowances remain virtually identical up to the present time. Mr. Schwab made no mention of a quota system, yet he intimated there was one. Noteworthy, is the fact that Mr. Schwab has not testified again. Could it be that he was no longer considered reliable or trustworthy, and why - because, he told the " awful truth " ?

4. **Veterans Due Process** introduced into the HVAC hearings of June 25, 1986, the first of two " deep throat " anonymous letters sent to Mr. Gordon Erspamer, Nars lead counsel. Deep Throat's " whistle blowing " letter laid bare some of the onerous tactics used to frustrate and intimidate veterans into abandoning perfectly valid claims. Some of the abusive tactics described, are as follows:

a) **using deception** to deny hearings at crucial and sensitive stages of the adjudication process. Later perpetrators rewarded with exceptional evaluations, promotions and merit bonuses.

b) **rubber stamping** of medical rating decisions at the speed of one or two per minute.

c) **denying claims** for failure of veterans to respond to correspondence never sent.

d) **Fraudulently enhancing** productivity performance records to achieve merit bonuses and to promote empire building schemes.

These tactics were creatively and cunningly developed over a great number of years for purposes of safequarding the VA's quota system of non- adversarial injustice.

Deep Throat's credibility must be pretty good considering The District Court in San Francisco - accepted his version of the facts, contained in the second letter, advising of the destruction by the VA of sensitive documents requested under court order. The Court subsequently fined the VA $ 145,000 for that transgression and was forced to employ a Special Master for purposes of insuring fair play concerning future requests for evidence.

If the VA pays no attention to Court orders, what attention will they pay to powerless veterans interests and concerns ?

5. **On March 17, 1987** before a joint session of the Senate and House Veterans Affairs Committee, VA employees Ronald Abrams, Barry Boscovich and Thomas J. Kenney testified to the following :

a) **veterans** are not being treated fairly in accordance with the VA's own rules.

b) **claims** are being prematurely denied without advising veterans of their right to appeal.

c) **claims** are being denied for failure to provide unnecessary information.

d) **veterans** are often required to furnish service records which are the responsibility of the VA.

e) **veterans** are requested to provide income statements although this information was irrelevant to the claim.

f) **veterans** who supply income statements can be denied for reporting excess income although income is irrelevant to the claim.

Startling was the revelation by Mr. Abrams, of a case uncovered in the St Petersburg office, regarding a Korean veteran who had lost both legs in combat and had not yet (to his knowledge) received his benefits. It was Mr. Abrams understanding that the claim had not been allowed because of the veteran's failure to supply information which the Agency was obligated to provide. Also startling, was the Joint Committee's apparent failure to inquire into the current status of the matter.

Eggregious Cases.

The NVSO's have repeatedly testified that the VA's non-adversarial system is fair and that, on occasion, a few claims fall through the cracks. Our contention, is that it's more like a yawning chasm or deep abyss, as some of these examples will attest :

1. **Tracy vs Gleason,** 379 F 2d 469 (1967) was a case which ultimately went to the U.S. Circuit Court of Appeals for the District of Columbia. In this action, the veteran's estate sued for the retroactive payment of benefits which were alleged to be wrongfully withheld by the VA. It seems, the VA terminated benefits originally awarded Mr. George Tracy because he failed to return an income questionaire. At the time , however, Mr. Tracy had been confined to a mental institution for 12 years. The VA knew he had no income from prior replies. Despite the hospital Acting Superintendent's letter advising of his mental condition, and lack of earnings - the VA cut off his benefits.

Inexplicably, the VA files already contained the income information for about three-fourths of the year to which the questionaire pertained. The pension application contains the following questions and answers :

Question- 8 (c) " Names and addresses of former employers for last 12 months. "
Answer - Hospitalized since June 30, 1936.

Question- 8 (e) " Give total income for last 12 months received from :

Employers	Answer : None
Self-employment	Answer : None
From All sources	Answer : None
Value of Estate	Answer : None

Question- 9 (c) If you had employment could you work full time ?

Answer: No

Question - If not, why ?

Answer: Hospitalized.

Question - Part-Time ?

Answer: Hospitalized.

Question - If not, why ?

Answer: Hospitalized.

The wonder is, how this matter ever got to the Circuit Court of Appeals ? What of the checks and balances ? How could the VA permit such a miscarriage of justice ? How could the General Counsel, the VA Administrator and the Justice Department attorneys, all fall flat on their faces ? Was this really a case of someone falling through the cracks or was this simply a case of cruel arrogance and unbridaled power ?

Wonder of wonders, the veteran's estate actually won this case in the Circuit Court of Appeals after losing in the District Court, which claimed lack of jurisdiction under 211 (a).

The Circuit Court of Appeals said " In our opinion the complaint tells a story of arbitrary and capricious action on the part of the officials : a) the Administrator acted arbitrarily in the circumstances when he terminated the pension of Tracy because that unfortunate, totally disabled by insanity, had failed to return an income questionaire; (b) the Board of Veterans Appeals acted arbitrarily in affirming the termination after it had learned the facts; and (c) the Administrator had acted arbitrarily in failing to make payments for the full period of discontinuance after he had ~~been told~~ what he should have known before: that Goerge Tracy was insane and was totally and permanently disabled in 1949 and continuously thereafter. "

The Circuit Court was able to grant judicial review, and consequently, justice under a loophole involving a distinction between a mere claim (not yet awarded) as opposed to the forfeiture of an already adjudicated award. Later Congress closed this loophole - in the middle of the night - and Veterans were denied their last chance at fairness and justice under judicial review.

Why did Congress foreclose the Veterans' last chance at justice ? Why did our NVSO's permit it, in the light of such cases as Tracy v Gleason, and many more which they were privy to ?

page-15-

2. **A recent case** (name withheld) involved a veteran who fell off a telephone pole (line of duty) thirty-three years ago, fractured his back and suffered herniated disc injuries. The VA denies his back is fractured and contends that his injury was sustained prior to service.

The unassailable facts are :

a) **The veteran was** a top baseball prospect of the Boston Red Sox at the time of his induction and never sustained a prior injury, as evidenced from the service pre-induction physical ; from his family doctor of 40 years; from his army record prior to injury.

Despite the VA's contention of a prior injury, not one piece of evidence has been presented to support their position.

b) **X-rays, Cat Scans, MRI's evidence** substantial damage to the veterans' back contrary to the VA 's opinion of little or no injury. The VA denied him Cat Scans for over six years necessitating their being taken privately at great financial hardship. Inexplicably, several VA physicians, who shall remain nameless, deliberately misread his Cat-Scans- requiring several outside confirmations to be performed.

During one instructive episode, the veteran brought a private Cat Scan and a report thereof to a VA Doctor. Upon examination, the Doctor proceeded to give the veteran a perfect verbal reading pointing out the disc herniations, fracture and spondylolisthesis in conformance with the private report. Thereupon the Doctor wrote in the veteran's records "positive for disc disease only ". When the veteran asked why the Doctor didn't write down what he told him ? The VA Doctor replied :

" I can't write down what I told you. It would make the whole orthopedic department look bad since we refused you a Cat Scan for 6 1/2 years and misdiagnosed you ! "

That brief encounter sums up the situation as much as anything could, but other VA Doctors deliberately or incompetently persisted in the misdiagnosis. Only the threat of a mal practice suit against the Doctors caused some changes in their recitation of the medical history. There is much more available on this wilful miscarriage of justice, should the Committee request it.

The treatment accorded this veteran's claim and person, evidences far more than someone falling through the cracks for 33 years. It evidences systemic and callous disregard for the welfare and interests of veterans and an astonishing degree of incompetence (if that's what it is) which requires immediate attention.

3. **Sgt. Ronald Beck,** a much decorated hero of the Vietnam war took his own life several years ago when it was apparent that the VA was totally insensitive to his war related injuries.

a) **Sgt. Beck's compensation** was first wrongfully reduced-then erroneously cut-off. Not wishing to become an added burden to his family, overcome by despair and hopelessness, he simply ended his life saying he could fight the Viet Cong but not the VA.

b) **The VA not content** with their wrongful, and outrageous treatment, sought to collect $ 1800 - an alleged overpayment which likewise was erroneous. Despite the fact that Sgt. Beck did not owe anything - and in fact was underpaid, he was precluded from pleading any defense.

c) **Several days** after his death, the VA tragically acknowledged that it was all a horrible mistake. Sgt Beck used the services of the DAV, who got it all wrong or didn't much care. The weeks grew into months and ultimately the callousness and lack of concern exhibited by the VA and DAV operating in concert was more than he could bear.

d) **During the course** of his VA created problems, Sgt. Beck required substantial surgery re: his war injuries which the VA wouldn't sanction. The surgery was absolutely necessary, as determined by several private medical specialists, contrary to the VA's opinion. Nonetheless, the operations were performed to alleviate his pain and suffering. All the VA could offer was - drugs and more drugs.

e) **Fortunately,** Mrs Beck had private medical insurance which covered her husband. The cost of $ 18,000, however, was approximately, $ 2800 more than the insurance company would agree to pay. To this day, the VA whose responsibility it was - to pay the entire amount or $ 18,000 - has refused to pay even the outstanding balance of of 2,800.

f) **The VA knew** that Sgt. Beck, an extremely proud man, had developed suicidal tendencies resulting from his feeling of inadequacy, drugs, mistreatment and unrelenting pain which prevented him from sitting comfortably. The VA and DAV knowing this, failed to take his condition into consideration and treated this American hero with all the indifference and disdain someone might show a cockaroach.

We recognize that mistakes can be made - but the VA and Service Officer's have seen so much of this - growing accustomed and insensitive to the pain and suffering which surrounds them. How could this tragedy occur ? What meaningful investigation has been performed ? What's to prevent its recurrence ? Nothing !

D. Truth in Recruiting: Requirement To Warn

Youngsters and their families are not advised prior to entering the United States Armed Forces that injury sustained therein will deny them access to the system of justice they sought to defend. If injured, such injury - will compel them to seek relief under title law # 38 which denies them access to the Courts and an attorney of their own choosing. Further, the VA operates under practices and procedures contrary to the spirit and intent of the Framers and the U.S. Constitution; and in the process thereof, denys veterans a fair and impartial hearing.

1. **Advertisements inducing** youngsters to join the Armed Forces advise of numerous advantages to be derived therefrom, but not one word of warning re: constitutional deprivation in the event of injury.

2. **Warnings, disclaimers** and disclosure statements abound re: credit, liquor, tobacco, household products, skating rinks, all-terrain vehicles, real estate, stock brokerage track records, etc.

3. **Warnings (Miranda)** are provided suspects advising them of their constitutional right to obtain an attorney and to remain silent. Failure to warn under such circumstances is considered so serious that charges pursuant to the crime must be dropped, absent a warning regarding the suspects constitutional rights.

4. **No one** entering the Armed Forces has been warned that, if injured, they will forfeit their constitutional right to an attorney and to petition the court for redress of just grievances.

Unless Congress restores veterans' first class citizenship rights, legislation should be immediately passed requiring youngsters and their families to be warned. If there must be " Truth in Lending " why not " Truth in Recruiting " ; unless, of course, the Congress wants to conduct a shell game ? In this regard, it's doubtful whether the NVSO's (for obvious reasons) would wish to openly lobby against a " Truth in Recruiting " bill.

If murderers, criminals and traitors must be warned of dangers to their constitutional rights, why not youngsters and their families ? That's the least Congress can do !

Implausibility of NVSO Arguments Against Judicial Review

1. Well Wishes and Good Intentions !

NVSO's : Assert that the V.A. has the veterans best interests at heart, leans over backwards in their behalf and that no further protection is needed.

Veterans Due Process : Submits that the V.A. is riddled with impermissable action nurtured by a lack of judicial review and legislative oversight. Examples of rubber stamping of medical rating decisions, procedural shortcomings, conflict of interest, productivity requirements, budgetary constraints, bias, etc. have all contributed to a climate of doubt and suspicion regarding the Agency's good intentions. The old bromide would appear to apply:

The Road to Hell is paved with good intentions !

2. The Non- Adversarial System or What Price Informality !

NVSO's: Assert that the system's non-adversarial procedures and informal atmosphere works to the benefit of veterans.

Veterans Due Process : Submits that the system is adversarial and should not be confused by its non-confrontational nature. Frankly, what good is a system which refuses to address your evidence or contentions or denys subpoena power or cross-examination, etc. Under such circumstances, veterans have no way of ascertaining how the Agency arrives at its decisions -or what facts were used- and how the facts were reconciled to its conclusions. Is it any wonder, that some veterans have pursued claims for over forty years and still can't find out why they lost. Is it any wonder, that Congressmen enlisted to assist veterans- can't find out either !!? This system is above the law and needn't explain or answer to anybody !

Honestly,what good is a system like that no matter how informal ?

3. The Myth of V.A. Medical Expertise.

NVSO's: Assert that the V.A.'s special medical knowledge permits them to evaluate claims with greater understanding.

Veterans Due Process : Submits that the V.A. has no special medical expertise, and any it may have, is held hostage to a quota system, budgetary constraints and productivity requirements. Incredibly, the V.A. has often expressed medical opinions contrary to the medical wisdom of that day, decades before or anytime thereafter- but, steadfastly refuses to admit error. Outside medical expert opinions advanced in support of veterans, are routinely ignored in favor of a V.A. general practioner's opinion adopting the Agency line.

The Quota System or the Benefits of Budgetary Constraints.

NVSO's : Assert that there is no quota system of dispensing justice at the Board of Veterans Appeals (B.V.A.).

VETERANS DUE PROCESS: Submits that veterans are wary of a system which operates at a 12.7 % claim allowance rate which seldom varies over the years. Also, veterans are suspicious of system in which claimants prevail equally well -whether they're represented by themselves, an attorney, a national service organization or by a chimpanzee ! The fact is, the V.A. has a quota system and it doesn't make a particle of difference who represents you- although, it should.

Lack of Legal Representation or the Blessings of Dying Intestate!

NVSO's : Assert that veterans are better off, if they don't have to share their benefits with unscrupulous attorneys.

VETERANS DUE PROCESS: Submits that the only veterans seeking legal counsel-had already lost, and were now seeking professional representation. Apparently, the NVSO's can't understand that it's far better to obtain 75% of something rather than 100% of nothing.

The reason for denying veterans legal representation gets to the heart of the matter. The V.A. has 27 unfair practices which serve to deny veterans a fair and impartial hearing. If attorneys were permitted to practice routinely before the V.A., they would complain to their local bar associations about the lack of due process: no right of subpoena; of cross examination; of independent appeal; of outside expert medical testimony; of etc. etc.

The legal profession simply could not tolerate such an unfair system and doubtless would lobby against it. Also, the American Legion, DAV and VFW are fearful that veterans would seek assistance from attorneys rather than join their organizations.

Veterans dispute statements which declare that they would be better off without attorneys, while the V.A. employs 800, all of whom seem bent on denying their claims.

Court OverCrowding or What Price Justice !

NVSO's: Assert that the Courts are overcrowded, and if veterans were permitted access to the courts- the costs, would be prohibitive.

VETERANS DUE PROCESS: Submits that veterans should not be denied access to the system of justice they fought to protect; nor are they responsible for the overcrowding, having been excluded from the courts for the last 55 years. The day when justice is deemed secondary to other considerations, will be the day that America is no longer America. Under such circumstances, we will have broken faith with the " Framers " and our Republic will be nothing more than memory.

Why are the NVSO's more solicitious of the Courts well being than they are of veterans ?

Why weren't the NVSO's leadership concerned with overcrowding when 145,000 veterans were hauled into Court by the VA in an endeavor to collect alleged overpayments, and why won't they permit veterans to return the favor ? Why aren't the NVSO's concerned when veterans aren't permitted to plead a defense ? Overcrowding doesn't appear to be an issue when the VA utilizes the Courts against the veterans only when the tables are turned .

What did Senator John Glenn mean in a recent Senate hearing (March 28, 1988) considering whether a judicial review amendment should be added to the VA Cabinet level status legislation, when he said to the NVSO leadership in the audience : " Go back and review your position on judicial review " ?

Senator Glenn continued : " I'll tell you, it just isn't right that we treat veterans as second-class citizens in this country ! I think, I as a veteran, deserve the same treatment as other Americans. I should think the veterans organizations would be in here **clamoring** for judicial review, not standing in its way. "

Senator Glenn's statement, more than any other recent statement, originating from the Congress, sums up the perplexing and bewildering incongruity of the NVSO's leadership position on the issue of judicial review.

Numerous other matters divide us from the NVSO leadership on judicial review, but the issues enumerated - are believed to be the most important.

The facts remain, veterans have no legal right to medical care or to compensation for their war related injuries. Sooner or later these injustices must be addressed before further damage is done to the social contract between the citizen and his government.

Is Mississippi, the Promised Land of Veterans Benefits ?

Inexplicably, the chance of obtaining service connected V.A. pensions in Mississippi and Arkansas appears to be twice as great as anywhere else in the U.S. Further, the average pensions granted there are considerably higher too - 30 % greater in Mississippi; 43 % greater in Arkansas.

Non-service connected disabilities likewise fare extremely well; 2.3 X the national average in Mississippi; 1.9 X in Arkansas. Incredibly, there are 72 % as many Non-Service connected claims in Mississippi as there are Service connected claims; in Arkansas, 60 %. The national average is only 31% which means that Mississipians are either sicker or smarter than everyone else.

What explanation can there be for this blatant favoritism ? Deference paid to veterans residing in Mississippi and Arkansas should come as no surprise to students of the V.A. and the House Veterans Affairs Committee (HVAC). Cong. G.V. Montgomery (D. Miss.) is the chairman of the HVAC while John Hammerschmidt (R. Ark) was its ranking Republican member. Seniority and power obviously have an impact on what veterans receive and from which state.

How could such blatant favoritism take place without arousing the ire of the country ? The awful truth is, that no one is watching the V.A. or analyzing its operations. Not the Congress; not the Press; not the Courts- not the States- not the NVSO's- not anyone !

Apparently, based upon the benefits dispensed in 1985, States such as California are being **short changed** $ 310 million, per year; Illinois, $ 204 million; Indiana, $ 70 million, whereas Mississippi and Arkansas are riding the " gravy train" . No satisfactory explanation has been offered to explain such large pension descrepancies.

Mississippi has provided the armed forces with the lowest number of service men (92.1 per thousand) whereas the national average is 118.2 per thousand of population. Yet they receive more claims and **higher per capita** benefits. No wonder Cong. G.V. Montgomery says the system ain't broke ! It does all right for Mississippi and Arkansas.

Accordingly, based upon the 1985 VA numbers, Mississippi is last in war but first in the hearts of the VA.

Note : All numbers and relationships developed therefrom were extrapolations derived from the V.A. Fiscal Year, 1985 reports furnished the Congress.

American Legion Financial Secrecy Act

U.S.C. Title Law # 36, Chapter 3, Section 49 says that " The said corporation (American Legion) shall, on or before the 1st day of January in each year, make and transmit to the Congress a report of its proceedings for the preceding calendar year. Said report shall not be printed as a public document."

Only a few highly placed individuals in the American Legion are believed to have access to the financial statements. Staff members of the House and Senate Veterans Affairs Committee professed to have little or no knowledge of what the financial reports contain, although some promised copies- none were forthcomimg.

What was the intent of Congress in keeping the American Legion's financial statements a secret from its members ? What purpose does it serve ? What is accomplished ? Who profits ? What activities are being fostered under the guise of secrecy ? What is being hidden ?

Surely American Legion members and the American people have a right to know where this tax exempt organization gets its income and what is done with it. What of salaries, perks and other goodies given to the leadership ? What assets are owned ? What causes are supported and how much is spent on each ? Who are its ouside auditors ? What of their relationship to huge insurance interests ? For that matter how much is known of the people who actually run the American Legion ? It's all a mystery rivaling the origin of the Nile river.

Title 36, chapter 3, section 49 enacted by the Congress is censurship practiced without rhyme or reason. Surely Congress owes the American people some explanation for the secrecy surrounding the American Legion's financial condition.

VA Blackmail Letter, June 5, 1986 and Relevant Facts

Gail Gomp , Director, Intergovernmental Affairs letter to the NVSO's, soliciting their cooperation in defeating HR 585, after similar legislation had passed the Senate unanimously, was a veiled threat evidencing blackmail. The significant portion, extracted from her ten page letter is as follows :

> **" Moreover, many special considerations currently extended to veterans service organizations may have to be curtailed. The providing of VA space and facilities, informal access to adjudicatory personnel, etc. could be affected by judicial oversight and increased representation by private attorneys. "**

What adds credence to this veiled threat is U.S.C. Title Law # 38, Section 3402 (2), otherwise known as the Blackmail and Intimidation Clause (BIC) which says : " The Administrator may in his discretion furnish, if available, space and office facilities for the use of paid full-time representatives of national organizations so recognized. " That awesome power, in the hands of the VA Administrator, represents big money to the NVSO's and creates an inherent conflict of interest.

The purpose of this once " secret letter " was to advise the NVSO's leadership that in their own interests (not members) they should lobby against H.R. # 585, a House bill, granting veterans access to the courts and the right to retain an attorney of their own choosing. Otherwise, the leadership could jeopardize the free services granted at the sole discretion of the VA Administrator.

At the time, there were 233 Co-sponsors of the bill in the House and a conservative estimate of 400 votes (out of 435) in favor, if it reached the floor. The VA was desperately trying to kill this bill, which they feared, with good reason. Hence, the blackmail letter. The measure had previously passed the Senate four times without a dissenting vote.

Free services consisting of : free rent, electricity, phones, supplies, etc. provide a basis for increasing NVSO membership rolls; also, creating a clear conflict of interest when representing veterans. How vigorously can NVSO's contest veterans' claims with the sword of Damocles hanging over their heads ? What must the NVSO's do to ingratiate themselves with the VA ? What do you suppose turned the NVSO watchdogs into lap dogs ? Obviously, the NVSO's can not strongly represent veterans for fear of antagonizing the VA and risk being tossed off the " gravy train " .

Another aspect of the blackmail portion of the Gomp letter which doesn't get much attention but is nonetheless significant, is - " informal access to adjudicatory personnel ". Does Ms. Gomp mean, that self represented veterans or veterans with attorneys or agents lack this priviledge ? If so, Congress should look into this practice since it would appear to be a breach of equal treatment under the law.

Moreover, Congress should seriously consider either giving the NVSO's the free space and services outright - removing the VA's Administrator's sole discretionary power - or, eliminate the free services altogether.

Summary

Common sense requires the Congress to take a serious look at Judicial Review. Never mind what the NVSO's say, they don't represent their members on the issue of Judicial review- common sense, tells you that. Their magazines and publications ignore judicial review although the subject is of immense importance to their members, and why ? NVSO statements in the Congress opposing judicial review are ludicrous, yet Congress treats them with great deference, as if their words descended down from Mt. Olympus. NVSO's won't debate this issue with us, because they can't. They would be laughed out of any serious forum in America.

Certainly, no American would willing wish to be a second class citizen and deprived of rights accorded traitors and criminals ? Surely no war injured American veteran believes that his benefits are "gifts" while welfare recipients receive entitlements. Try explaining that to some of these veterans ! If there are any veterans out there who agree with their NVSO leadership, we can't find them. Their leadership has no grassroot support, once the issues are understood.

Of course, the NVSO's can swamp the Congressional switchboards with messages exhorting the Congress to vote down judicial review - but, if someone, takes the time to explain what judicial review seeks to accomplish - there is no problem. After all, veterans may ignorant on the issue, but they're not stupid.

We know of no other issue which has obtained such overwhelming support in the Congress, but which - was not enacted into law. Even an administration veto would not prevail against the overwhelming sentiment favoring judicial review. Four times the full Senate passed judicial review unanimously. Four times the

House Veterans Affairs killed it in committee; the last time in 1986, with 233 co-sponsors. Is it possible, that one man can thwart the will of the Congress ? It certainly seems so.

None of this could happen if the American people knew of the issues involved. Unfortunately, the Press hasn't reported and Congress hasn't spoken out on the issue, and why ? Judicial review is one of the best kept secrets in America. It's even a secret from its victims, who believe only that a tragic mistake was made in their case - having no idea that VA abuse is massive and systemic. Moreover, having no idea that their NVSO's leadership betrayed them. Where would this knowledge come from ?

The Press has been silent, a victim of its own self- inflicted ignorance. Not a single newspaper has any full time personnel assigned to veterans affairs. Lacking credible, informed information, the editorial (newspaper) staffs avoid comment, except to decry veterans lobbies and their excesses.

Lack of newspaper coverage deprive Americans of knowledge relating to the massive due process violations experienced by veterans daily. An iron curtain of silence has descended over veterans' affairs. No newspaper investigative reporting ; no meaningful Congressional inquiries ; no government or agency examinations ; nothing of consequence - and this, the largest scandal in the history of the United States. All the while, the NVSO's sworn to protect the interests of their members - applaud and support the Agencies rape of veterans rights from a safe distance.

With a cast of millions, a budget in billions and a barn door wide open, could this be anything but the largest scandal in our nation's history ? With an **old boy revolving door** network occupying sensitive positions on all sides of the Iron Triangle. With the NVSO **"watchdogs"** turned into **"lap dogs"** by the Agency's largesse given at the VA's sole discretion. With the American Legion's financial statements **kept secret** from its members by order of the Congress. With **benefits double** the national average extended to the resident veterans of Mississippi, whose Congressman happens to be Chairman of the HVAC. And with **parties and favors** routinely exchanged among members of the Iron Triangle. What we have, is an **American tragedy** of herculean proportions nurtured by monumental neglect and apathy -potentially, adversely impacting our national defense.

Despite massive evidence of wrong-doing, the Attorney General won't act; neither will the Inspector General's office nor will the GAO or any other investigative agency of this government. The only recourse remaining, is for veterans to assert their right to a day in court with every resource at their command.

Anything else - is a fraud, a sham and a farce.

The Congress which has, so far, failed to protect the interests of the American people and veterans on the critical issue of judicial review, should be reminded of George Washington's relevant statement :

" How the war veteran is perceived to be treated will directly affect the willingness of future generations to make those same sacrifices. "

Surely, the right to a day in court is not too much to ask from the American people and its Congress.

VETERANS DUE PROCESS/ Sidney Cooper/ Suite 29 A
44 West 62nd Street/ New York, N.Y. 10023/ (212) 586-2993

Date: April 28, 1988

Oral Statement of:

Veterans Due Process, Inc.

Prepared by:

SIDNEY COOPER

National Legislative Director

Submitted to :

UNITED STATES SENATE
COMMITTEE ON
VETERANS' AFFAIRS

Concerning

S. 11

To provide Veterans with Judicial Review (a day in court) and access to an attorney, at reasonable expense.

For Hearing of April 28, 1988

Place: SROB, Room 418

Veterans Due Process, in behalf of millions of veterans, wishes to express its strong disapproval of this plague- take it, VA non- adversarial system of injustice which has caused veterans so much hardship, degradation, homelessness and despair. Stonewalling, red herrings and smoke screens no longer will suffice to keep the awful truth from the American people.

This plague -take it system of injustice denies veterans rights which are accorded traitors, spies, criminals and perverts: such as the right to an attorney and a day in court. Consequently, veterans interests are routinely trampled by bureaucrats with unbridaled power whose treatment of veterans has become the shame of a nation. Bureaucrats with competing interests: primarily their own - involving - budgetary considerations, empire building, promotion, monetary awards and undisclosed interests harboring secret agendas have supplanted fairness and justice at the VA.

None of this would have surprised Senator Huey Long of Louisiana, who in 1933, when these infamous laws were passed - said : " How long are we going to sit here and see people turned out of hospitals and starved to death by these little 2 by 4 bureaucrats, exercising more power than the 96 members of the United States Senate ? Instead of being men, standing up on 2 legs and 2 feet and running this government for the people of the United States, we are authorizing some bureaucrat to prescribe limits and rules under which he will work, and then permit him to go off and do what he pleases. That is the trouble with the whole " plague - take -it " system , and that is the reason why veterans are in the fix they find themselves today. " (CR, June 2, 1933, page 4811).

The Veterans Administration has been uniquely placed above the law by ill considered and " unconstitutional " laws which insulate its decisions from court review. Moreover, the VA vigorously asserts, that it needn't account to anyone for its actions or procedures.

What do you think Senator Long would have said about VA bureaucrats telling a Federal Court that if it denied - a woman's claim on account of gender, that it was none of the Court's business ; or if it wished to deny claims on account of race, that it was none of the Court's business; or if it wished to deny claims on account of color, that it was likewise none of the courts business ? What should the Congress say to that ? Is that what Congress intended ? More importantly, what is Congress going to do about it ? Congress spawned this bureaucratic monster, now it's up to Congress to bring it to heel and quick, before it consumes us all.

What do you think Huey Long would have said to the American Legion, DAV and VFW, purportedly representing millions of veterans, whose leadership routinely comes to Washington, telling Congress - our members are happy to be considered second class citizens and denied legal rights which are accorded traitors, spies, criminals and perverts ?

What would the American people say about a 55 year old Congressional practice, collaborated in by the established veteran leadership - of hoodwinking American youngsters into our armed forces and then, if injured, strip them of their constitutional rights - consigning them to a lifetime of degradation, despair and homelessness ?

What would the American people think about a leadership which sold its members out on a cross of free services and then proceeded to lie about it ?

Senator Long and the American people would call it, a cowardly betrayal of the veteran and a national disgrace ! If their members only knew - that leadership, would be run out of town on a rail. Consequently, the leadership - in its own defense dare not print a single word about their betrayal in veteran's publications.

What would veterans think about a leadership, which permitted the VA to haul 145,000 veterans into court - but, won't permit veterans to return the favor or even plead a defense ? One side of their mouth contending, that the courts are overcrowded when veterans wish to enter; and on the other side, saying that it's not overcrowded when the VA wishes to enter. What double dealing treachery is this ?

What would American Legion, DAV and VFW members think about a system where the bureaucrat is King and can do no wrong ! Meanwhile, veterans lose 88 percent of time no matter how good a case they may have. A system which permits veterans no cross examination or subpoena power; where a veteran's specialist Doctor is always wrong and the VA's general practitioner is always right.

What would veterans think about a quota system, which permits the VA to do anything it wishes with impunity, such as panel rigging, deck stacking, panel shopping, courtesy decisions etc. - and when the bureaucrats are nailed, assert that the rules and regulations permit them to do it.

How can the American Legion, DAV and the VFW have the nerve to tell the Congress and the American people that they represent veterans on the issue of judicial review ? More importantly, how could the Congress believe it !!?

What about some of the egregious decisions, like the case of the institutionalized, insane veteran whose benefits were cut off for failure to respond to a questionaire when the VA knew the veteran was insane. This actually became a U.S. Circuit Court of Appeals case. How could the VA Administrator, the Board of Veterans Appeals, the General Counsel and the Justice Department attorneys defend the government in such an action ? Nonetheless, they did so - to their everlasting shame. Was this a case of someone falling through the cracks, or was this another example of the plague- take it, devil keep it system ?

What about the Korean vet, who lost both legs in combat and still hadn't received his pension according to HVAC testimony received in March, 1987 ? Still another implausible case of a veteran falling through the cracks in this plague infested system.

Why does the VA contend, in thousands of cases that the veteran sustained a prior service injury, when the pre-induction physical, family Doctor statements, school records and service up until the injury occurred - indicate otherwise, remains a mystery. When the VA is asked to produce proof to substantiate its position of prior injury - none is forthcoming. Nor under the plague- take it -, devil- keep it system, do they have to present any proof under Title Law # 38. Some veterans have wandered the corridors of time for 40 years and still can't find out why their claims were denied.

Murders, suicides, drugs, bribes, mal practice and worse are routinely covered up at the VA. Cover up, deception and deceit are part and parcel of this plague- take it, devil- keep it system. The Cincinatti serial hospital killer; the recent Kerrville murder, of a quasi VA employee by a veteran driven temporarily insane by the inhumane treatment accorded his claim; the pharmaceutical bribe scandals, which have been investigated for over four years without a meaningful report, etc. are just " tip of the ice berg " scandals which the VA has managed to contain and consequently keep from the American people. How much more of this will the Congress permit before doing something about this plague-take it system ?

Four times the full U.S.Senate unanimously passed legislation granting veterans access to an attorney and the right to a day in court. Each time , however, the HVAC failed to report out similar legislation. The last time or 1986 there were 233 co-sponsors in the House and the bill assured of passage, if it reached the floor by a margin of 400- 35. A threatened

Administration veto would have been overridden by a substantial margin.

Americans outside the beltway can not understand how the Senate could unanimously pass legislation four times only to be thwarted - each time - by a single Congressman from Missisisspi. What kind of political chicancery is this ?

Cong. Montgomery, HVAC Chairman, has steadfastly asserted that the system " ain't broke, why fix it ! " while the veterans of Mississippi receive twice the benefits of veterans residing elsewhere. If veterans of California had been treated equally with those of Mississippi, they would have received $310 million more; Illinois, $ 204 million more ; Indiana, $ 70 million more; etc. Obviously, the plague -take it system, ain't broke in Mississippi !

What should the American people think about a Congress's common sense- having passed laws mandating that veterans interests be treated equally with those of the government - and then, giving the bureaucrats the keys to the check book and promotion, ignoring veterans cries for relief ? In effect, putting the fox in sole charge of the chicken coop.

What should the American people think of a Congress that passed laws which granted veterans the benefit of the doubt and then did nothing to insure its implementation, leaving it solely to the discretion of bureaucrats ? Once more, ignoring veterans cries for relief from this plague- take it system.

What would anybody think of a Congress which enacted legislation granting an Agency blackmail power over veterans organizations- thereby, creating an inherent conflict of interest between veterans and their leadership ?

What would anyone think of a Congress which passed laws denying veterans the right to see their organization's financial statements ? In effect, keeping the financial condition a secret from its own members- not to mention the public. Could anyone believe that the Congress could act so irresponsibly ? And when Veterans Due Process, wished to inform the Congress about the true sentiments of veterans and this plague -take it system, we were denied entrance, until now. If anyone had told you this, would you believe it ?

Did Congress intend to pass such laws or was it a victim of Mother Nature ?

Emboldened by such perceived unrestrained license, the VA - after fifty-five years, has clearly run amok with unbridaled power. The potential for abuse under such circumstances would not have surprised Lord Acton who concluded that : " Power corrupts, and absolute power corrupts, absolutely ! " It should not now come as a surprise to the Congress that the VA (its creation) claims more power than the Congress has to bestow.

In conclusion Veterans Due Process submits, that Congress must consider truth in recruiting, just as there's truth in lending or advertising ; a fair and impartial forum to adjudicate veterans claims; elimination of the blackmail and intimidation clause ; veterans publications must be open to opposing views ; the financial secrecy act must be repealed ; attorneys must be permitted access to the VA adjudication system; VA rules, regulations and operating practices must be subject to the APA ; De Novo review at U.S. District Court level must be allowed, there being no satisfactory alternative; grass roots organizations such as Veterans Due Process must be afforded the opportunity to speak by matter of right, not sufferance at Congressional hearings.

Congress and the American people should be reminded of what the Father of Our Country, George Washington said :

> **" How the war veteran is perceived to be treated will directly affect the willingness of future generations to make those same sacrifices. "**

Surely, the right to a day in court is not too much to ask from the American people and its Congress. The conscience of a nation demands it !

Thank you.

NEIL GOLDSCHMIDT
GOVERNOR

Department of Veterans' Affairs

OREGON VETERANS' BUILDING, 700 SUMMER STREET NE., SALEM, OREGON 97310-1201

February 26, 1988

The Honorable John Kitzhaber
The Honorable Vera Katz
Co-Chairpersons, State Emergency Board
State Capitol
Salem, OR 97310

Dear Chairpersons:

SUBJECT: Report on Attorney Services for Veterans

The following report is respectfully submitted in accordance with Chapter 790, Section 3, Oregon Laws 1985.

Applications were accepted for the program of Attorney Services for Veterans beginning July 1, 1986. The program was established on a "test" basis to assist certain eligible Oregon war veterans with claims filed through the U. S. Veterans Administration (VA).

Fifty veterans were referred to one of the two private attorneys under contract for this program with the Director of Veterans' Affairs.

Of the fifty veterans' claims referred to the attorneys, sixteen (32%) were closed by the attorneys with no development. The remaining thirty-four claims (68%) are still in the hands of the attorneys, pending development, further appeal, or VA decision.

Three claims (6%) have received a partial award of benefits by the VA in favor of the veteran. However, all three of these veterans already had established service-connected disability ratings with the VA at the time of referral to the attorneys. They were awarded small increases in the disability ratings.

Fees paid to the attorneys (at $30.00 per hour) by ODVA through January 1988 are $18,012.00. The maximum contracted amount is $20,000.00 total ($10,000.00 per attorney). The attorneys project ninety-nine hours to complete the representation of the thirty-four cases. The projection

INVEST IN OREGON'S FUTURE — HIRE A VETERAN

Co-Chairpersons, State Emergency Board
SUBJECT: Report on Attorney Services for Veterans
Page 2
February 26, 1988

exceeds the contracted amount by $984.00. No funds were appropriated by the Legislature for the program during this biennium. However, both attorneys have indicated that they will continue to represent the thirty-four veterans until the claims are resolved.

ODVA has been in contact with the three law schools in Oregon since the establishment of the program in an attempt to involve law students in representation for veterans. Lewis and Clark, Northwest School of Law has expressed some interest in developing a grant for a "clinic" in VA law. ODVA has provided information on six possible grant sources.

Sincerely,

JON A. MANGIS
Director

LF:JJ
6012

DEPARTMENT OF VETERANS' AFFAIRS INTEROFFICE MEMO

DATE: January 19, 1988

TO: Cher LaMar, Assistant Administrator, Veterans' Services Division

FROM: Thomas A. Weiss, Counseling Supervisor, Veterans' Services Division

SUBJECT: OREGON ATTORNEY ASSISTANCE "TEST" PROGRAM
JULY 1, 1986 - DECEMBER 31, 1987

Oregon Revised Statutes (ORS) 406.410(1) The Director of Veterans' Affairs, on behalf of this state, may, with the agreement of the Attorney General, contract with attorneys for the provision by the attorneys of services, as counsel for war veteran residents of Oregon in the preparation, presentation and prosecution of claims under laws administered by the United States Veterans Administration.

(2) Legal services shall be provided under a contract only for claims arising from or relating to:

(a) The status of the war veteran as a prisoner of war under circumstances described in ORS 805.110(2);

(b) Damages suffered by the war veteran due to exposure to causative agents, as defined in ORS 408.305(4) while on active duty;

(c) Damages suffered by the war veteran as a consequence of exposure to radiation during testing of nuclear weapons; or

(d) Service by the war veteran in any combat zone while the Armed Forces of the United States were engaged in armed conflict with military forces of another nation.

Applications were received from sixty-seven (67) war veterans. Applications were denied for sixteen (16) individuals. The reasons for the denials are as follows:

2 - Widow of a veteran;
6 - No combat, or not a result of POW status, Radiation, or Causative Agents;
5 - VA had not denied veterans' claims;
2 - Did not serve during wartime;
1 - Applicant not a veteran

Fifty (50) war veterans were referred to one of two attorneys.

Attorney	Number Referred
Frank L. Freyer	28
James L. Weerts	22

Sixteen (16) cases have been closed by the attorneys for the following reasons:

10 - No legal basis for representation against the U.S. Veterans Administration (VA);
2 - War veterans died;
2 - War veterans failed to cooperate with attorney;
2 - War veterans voluntarily withdrew from the program.

Average cost per closed case = $ 129.75
Average hours per closed case = 4.33

Total cost for 16 closed cases = $ 2,076.00
Total hours for 16 closed cases = 69.20

Two (2) attorneys are representing the remaining thirty-four (34) war veterans in their claims to the VA. These claims can be categorized as follows:

24 - Pending development of evidence;
2 - Pending decision on appeal by BVA;
3 - Partial award of benefits;
5 - Benefits denied by BVA (2 of these claims are pending an Administrative Review of BVA's denial of claims).

Five (5) war veterans' claims were denied by BVA as follows:

1 - World War II veteran claiming benefits as a result of being a POW;
1 - World War II veteran claiming benefits as a result of combat;
1 - Korean War veteran claiming benefits as a result of combat; and
2 - Vietnam War veterans claiming benefits as a result of combat. One of these Vietnam War veteran's claim also covered residuals of exposure to a Causative Agent (Agent Orange).

Three (3) war veterans' claims received a partial award of benefits as follows:

1 - World War II veteran received retroactive benefits as a result of being a POW. New-rating authorized by PL 99-576 which allowed existing disabilities to be rated service-connected. Partial denial of benefits for those disabilities not affected by PL 99-576. Veteran was awarded $1,902 retroactive payment through November 30, 1987. His combined service-connected disability rating increased from 30% to 40% effective October 1, 1986 and to 50% effective March 25, 1987.

1 - Vietnam War veteran for disabilities resulting from combat. This war veteran received a retroactive payment of $11,614.73 through November 30, 1987. His combined service-connected disability rating increased from 30% to 50% effective February 9, 1982. Attorney prepared written

appeal and represented veteran at a "Personal Hearing" before Traveling Section of BVA. The attorney believes that veteran should be rated higher than the current 50% rating. The attorney is currently appealing this issue on behalf of the veteran.

1 - Vietnam War veteran for disabilities resulting from combat. This war veteran received a retroactive payment of $621.00 through November 30, 1987. His service-connected disability rating increased from 0% to 10% effective February 1, 1987. Service-connection for additional disability was denied. Attorney will continue to develop that part of the claim.

Of the fifty (50) war veterans referred to the attorneys:

* 32% of the claims were closed with no development by the attorneys;
* 6% of the claims have been allowed by the VA;
* 10% of the claims have been denied by the VA;
* 52% of the claims are still pending additional development by the attorneys.

The cost of this "test" program from July 1, 1986 through December 31, 1987 was $17,628.00.

The attorneys have projected the cost to complete the thirty-four (34) claims still open at $5,042.00. This is $2,670.00 more than has been allocated for the Oregon Attorney Assistance "Test" Program.

As a final note, both contract attorneys have stated that they will continue to represent the veterans that have been referred until the claims are resolved, even after the current funding has been exhausted. This is an extension of a "limited" practice of free service to veterans they have provided in the past.

ATTORNEY ASSISTANCE MONTHLY REPORT

JANUARY 1988
Month Year

	# Apps	# WWI Apps	# WWII Apps	# Kor Apps	# VNM Apps	# POW Apps	# RAD Apps	# CAE Apps	# CBT Apps
Eligible	0	0	0	0	0	0	0	0	0
Ineligible	0	0	0	0	0	0	0	0	0
Monthly Totals	0	0	0	0	0	0	0	0	0
Program Totals	* 67	0	25	13	29	6	10	11	40

Attorney Name	# App Referred	# App Accepted	Attorney Resigns	VA Allowed	VA Denied	VA Money Recovered
Freyer	0	0	0	0	1	$ 0.00
Weerts	0	0	0	0	0	$ 0.00
Monthly Totals	0	0	0	0	1	$ 0.00
Program Totals	50	47	13	3	5	$ 14,137.73

Attorney Name	Projected Hours	Hours Used	Hours Remaining	Total $ Projected	Total $ Used	Dollars Remaining
Freyer	29.0	320.9	- (16.6) 12.4	- ($ 498.00) $ 373.00	$ 9,627.00	-($ 498.00) $ 373.00
Weerts	70.0	279.5	- (16.2) 53.8	- ($ 486.00) $ 1,615.00	$ 8,385.00	-($ 486.00) $1,615.00
Program Totals	** 99.0	600.4	- (33.0) 66.2	- ($ 984.00) $ 1,988.00	$18,012.00	-($ 984.00) $1,988.00

* Program totals now reflect the number of individuals who have applied, as opposed to the number of applications received.

** Attorney's current projected hours to complete war veterans' representation to the VA will exceed the contract amount by $984.00.

Prepared By:

POW - Prisoner of War
RAD - Exposure to Radiation
CAE - Causative Agent Exposure
CBT - Combat

ATTORNEY ASSISTANCE MONTHLY REPORT

DECEMBER — Month
1987 — Year

	# Apps	# WWI Apps	# WWII Apps	# Kor Apps	# VNM Apps	# POW Apps	# RAD Apps	# CAE Apps	# CBT Apps
Eligible	0	0	0	0	0	0	0	0	0
Ineligible	0	0	0	0	0	0	0	0	0
Monthly Totals	0	0	0	0	0	0	0	0	0
Program Totals	* 67	0	25	13	29	6	10	11	40

Attorney Name	# App Referred	# App Accepted	Attorney Resigns	VA Allowed	VA Denied	VA Money Recovered
Freyer	0	0	0	0	1	$ 0.00
Weerts	0	0	0	0	0	$ 0.00
Monthly Totals	0	0	0	0	1	$ 0.00
Program Totals	50	47	13	3	5	$ 14,137.73

Attorney Name	Projected Hours	Hours Used	Hours Remaining	Total $ Projected	Total $ Used	Dollars Remaining
Freyer	98.0	313.6	- (78.3) — 19.7	- ($ 2,349.00) $ 592.00	$ 9,408.00	-($ 2,349.00) $ 592.00
Weerts	70.0	274.0	- (10.7) 59.3	- ($ 321.00) $ 1,780.00	$ 8,220.00	-($ 321.00) $ 1,780.00
Program Totals	** 168.0	588.6	79.0	- ($ 2,670.00) $ 2,372.00	$17,628.00	-($ 2,670.00) $ 2,372.00

* Program totals now reflect the number of individuals who have applied, as opposed to the number of applications received.

** Attorney's current projected hours to complete war veterans' representation to the VA will exceed the contract amount by $2,670.00.

POW - Prisoner of War
RAD - Exposure to Radiation
CAE - Causative Agent Exposure
CBT - Combat

Prepared By: Thomas A. Weerts

EXHIBIT B

State of Oregon
DEPARTMENT OF VETERANS' AFFAIRS

Combined Statement of Revenues, Expenses, and Changes in Retained Earnings
PROPRIETARY FUND TYPE
For the Fiscal Years Ended June 30, 1987, and June 30, 1986

	Proprietary Fund Type	
	Enterprise	
	June 30, 1987	June 30, 1986
Revenues:		
Interest Income:		
Mortgage Loans	$ 347,401,893	$ 350,234,614
Contracts	23,046,482	17,386,646
Investment Income	76,809,703	71,425,750
Service Charges	2,409,910	2,537,037
LCLI Processing Fee (Note 6)	406,376	423,108
Gain on Sale of Foreclosed Property	688,920	582,207
Other Fees and Charges	423,670	410,879
TOTAL REVENUES	$ 451,186,954	$ 443,000,241
Expenses:		
Direct Salaries	$ 9,245,560	$ 9,469,824
Other Payroll Expenses	3,386,095	3,420,567
Services and Supplies	5,173,046	5,363,096
Depreciation Expense	654,637	532,038
Loss on Repossession of Real Property	24,763,094	25,458,477
State-Owned Property Expense	5,203,728	6,062,327
Foreclosure Expense	912,637	944,023
Commercial Paper Interest	0	2,066,082
Federal Finance Bank Note Interest	0	3,325,808
Tax Note Interest	5,163,278	7,910,667
Bond Interest	402,631,871	400,422,527
Accreted Bond Interest (Note 13)	1,015,298	826,373
Amortization of Premium and Discount	(800,112)	(905,553)
Attorney and Fiscal Agent Fees	1,222,686	465,317
Bond Costs and Insurance	8,490,082	4,956,543
Aid to Veterans' Service Programs	398,303	397,372
Other Expenses	52,466	188,732
TOTAL EXPENSES	$ 467,512,669	$ 470,904,220
LOSS BEFORE EXTRAORDINARY ITEM	$ (16,325,715)	$ (27,903,979)
Extraordinary Item:		
Loss on Advance Refunding (Note 10)	(64,868,862)	0
NET LOSS	$ (81,194,577)	$ (27,903,979)
Beginning Retained Earnings	8,587,778	36,491,757
Ending Retained Earnings	$ (72,606,799)	$ 8,587,778

The accompanying notes are an integral part of these financial statements.

Financial Status: The Department registered an approximate $81 million loss for the fiscal year ending June 30, 1987, of which approximately $65 million was the result of issuing $300 million of Series 74 bonds to defease approximately $232 million of higher cost debt. $65 million of the $81 million loss was a one time non-cash accounting loss related to the $300 million advance refunding sale.

The upside of the situation is that the Department achieved an economic gain of approximately $19 million in present value dollars by reducing its overall future debt service requirements.

Educational Benefits: Educational aid benefits were paid to 41 veterans in fiscal 1986-87 in the amount of $11,850. Since the program started in 1945, payments have gone to 16,078 veterans in the amount of $4,875,720 for an average payment of $303.

Claims and Counseling: The Department's Veteran Services program conducted 7,862 counseling and service interviews in 1986-87 and made monetary recoveries of $38,011,045 in pensions, compensation and other benefits for veterans and their dependents and survivors.

Conservatorships: The Department serves as conservator of the estates for certain protected persons who are recipients of the federal Veterans Administration benefits. As of July 1, 1987, Oregon Circuit or county courts had assigned 1396 cases to this agency for estate management since the program was established in 1965. Of these, 925 have been closed, leaving a caseload of 471 active accounts.

NOTE: Statistics in this section are approximate and reflect the end of fiscal 1986-87 unless otherwise specified.

Veterans
Due
Process INC.
P.O. BOX 68237 PORTLAND, OREGON 97268-0237
(503) 659-9912

May 18, 1988

Senator Alan Cranston, Chairman
Committee on Veterans' Affairs
United States Senate
414 SROB
Washington, D.C. 20510-6375

RE: **OREGON ATTORNEY SERVICES LAW**

Dear Senator Cranston:

During the April 28, 1988, Senate hearing on S.11, Veterans Due Process, Inc. (VDP), was asked the following question:

> **"Mr. Cushman, could you describe for us the current status of the effort in Oregon to provide attorneys at State expense, to represent claimants before the VA."**

In response to that question, the hearing record will show that I gave a brief oral summary of a "final report" concerning the Oregon **Attorney Services Law** (ASL), which was recently prepared by the Oregon Department of Veterans' Affairs (ODVA), and I entered a copy of said report into the hearing record, but later during the hearing I requested permission to submit a report from VDP into the hearing record, in order to clarify the reasons why VDP believes that the ASL was never meaningfully implemented in a manner consistent with the intent which caused the passage of the law. This report is submitted pursuant to the Senate approving the inclusion of this information.

During 1985, VDP was directly responsible for the passage of the Oregon ATTORNEY SERVICES LAW (ASL), Chapter 790, Oregon Laws 1985, codified at Oregon Revised Statutes (ORS) 406.410-.430 (see **EXHIBIT "A"**). The ASL was introduced as Oregon House Bill 2769 on Feb 11, 1985, passed the Legislature on June 20, 1985, was approved by then Governor Atiyeh on July 15, 1985, and became law on September 20, 1985. On August 15, 1985, an "Implementation Meeting" concerning ASL was held in the State Capitol, and I was the Chairman of that meeting. ODVA did not commence to implement and administer the ASL until July 1, 1986, on account of a series of delays caused by both the Federal VA and ODVA.

The intent of the new law was to provide impartial, disinterested and meaningful, professional legal scrutiny, into adverse decisions which the United States Veterans Administration (VA) had made concerning VA claims of Oregon veterans. It was our hope that by allowing the State of Oregon (a third party) to contract with private attorneys to provide representation to such veterans, that a meaningful analysis of the present VA/"IRON TRIANGLE" (see **EXHIBIT "B"**: Congressional Quarterly Weekly Report article entitled "THE VETERANS' LOBBY/THE IRON TRIANGLE", vol. 38, No. 24, Pages 1609-1688) system of "justice", would result. It did not! The Oregon ASL is now, effectively, dead, even though it continues to appear in the ORS. In order to understand how and why the ASL was rendered meaningless, it is important to be aware of certain Federal Laws, Oregon Laws and other mechanisms, some of which appear below:

NEITHER THE CITIZENS OF THE STATE OF OREGON, NOR THEIR ELECTED REPRESENTATIVES, DETERMINE WHO WILL BE THE DIRECTOR OF THE STATE OF OREGON, DEPARTMENT OF VETERANS' AFFAIRS

Oregon law (see ORS 406.020) provides that the office of **Director** of Veterans' Affairs of the Oregon Department of Veterans Affairs (ODVA) shall be filled by appointment of the Governor subject to confirmation by the Senate, **but** specifically provides that:

> "Such appointment shall **NOT** be made without the **WRITTEN APPROVAL of the Advisory Committee** . . ."

FEDERAL CONGRESSIONALLY CHARTERED VETERANS ORGANIZATIONS DETERMINE WHO WILL BE THE DIRECTOR OF THE OREGON DEPARTMENT OF VETERANS AFFAIRS

The members of the "Advisory Committee" are establised by Oregon State Law (see ORS 406.210) which provides that the "Advisory Committee" shall consist of 9 persons, and that the representation shall be maintained as follows:

1. American Legion representative.
2. Disabled American Veterans representative.
3. Veterans of Foreign Wars representative.
4. Military Order of the Purple Heart representative.
5. Veterans of World War 1 of the U.S.A. representative.
6. A veteran of the Korean conflict.
7. 3 veterans of the Vietnam conflict.

NEITHER THE PEOPLE OF THE STATE OF OREGON, NOR THEIR ELECTED REPRESENTATIVES, DETERMINE THE MEMBERS OF THE ADVISORY COMMITTEE TO THE OREGON DEPARTMENT OF VETERANS AFFAIRS

ORS 406.410 also provides that:

> "The representation on the committee provided for in this section shall be maintained by the Governor in making appointments to fill vacancies . . . A vancancy occurring in the office of any member of the Advisory Committee previously recommended for appointment by the executive committee of the Oregon department of . . . (the above cited organizations or other representatives), **SHALL be**

> **filled by appointment of some person recommended by the executive committee of such organization** in this state if the recommendation is received by the Governor within 15 days after the vacancy occurs."

Therefore it is not the Governor or the Legislature who have control over who shall be members of the ODVA Advisory Committee. It is the executive committees of the veterans service organizations, which, in the final analysis, determine who will constitute the Advisory Committee.

The Director of ODVA (who holds said office only with the written approval of the ODVA Advisory Committee which is controlled by individuals recommended by the executive committees of the above cited veterans organizations), is **required** by ORS 406.050(6)) to:

> " . . . extend such assistance as he shall determine to be reasonably required to any war veteran and to the dependents of any such war veteran, in the prosecution of any claim or claims before the Veterans Administration of the United States . . . "

During the past 4 decades, said "assistance" has not been provided **directly** to aggrieved war veterans (and/or their dependents) who believe that the federal VA has wrongfully and/or illegally denied them the VA service-connected disability compensation, VA medical care, etc., which such veterans believe themselves to be entitled by federal statute law. Such State "assistance" has been, and continues to be, provided through a "network system" which includes ODVA, national veterans service organizations, county veterans service officers, etc.

DIRECTOR OF STATE VETERANS' DEPARTMENT AUTHORIZED TO PROVIDE STATE FINANCIAL AID TO VETERANS SERVICE ORGANIZATIONS, BUT ONLY "WITH THE APPROVAL OF THE ADVISORY COMMITTEE"

The State of Oregon now provides State financial aid, **directly to veterans service organizations**, pursuant to ORS 406.310 which provides, in part, as follows:

> "Director authorized to aid veterans organizations. From funds available to his office for this purpose, the director, **WITH THE APPROVAL OF THE ADVISORY COMMITTEE**, is authorized to aid war veterans' organizations **that have been accredited by the Veterans' Administration of the United States** and counties of the state, in connection with their respective **programs of service to war veterans.**"

Therefore, the Director of the State Veterans' Department (who can only get his job with the "written approval" of the "advisory committee" which is comprised, for the most part, by representatives of the national veterans organizations) must have the "approval of the Advisory Committee" in order to provide state financial aid to those same veterans organizations. That is a clear conflict of interest.

In order to qualify for State "funding assistance", ORS 406.320 requires that veterans organizations desiring to apply for benefits under ORS 406.310:

> " . . . shall submit to the director statements of their expenditures incurred in conducting their rehabilitation programs, in acting under power of attorney for veterans in connection with claims for benefits, in assisting veterans in prosecutions of their claims . . "

Appearing in ODVA booklets entitled: "Reports from the Department of Veterans' Affairs to the Advisory Committee", dated September 27, 1985 and September 25, 1986, is the following breakdown of State financial aid provided to the listed veterans service organizations, during the specified years:

ACTUAL STATE AID PROVIDED TO VETERANS SERVICE ORGANIZATIONS

	1984-85	1985-86
AMERICAN LEGION	$34,900.00	$29,931.00
DISABLED AMERICAN VETERANS	21,758.00	20,044.14
VETERANS OF FOREIGN WARS	24,332.25	22,135.54
AMVETS	.00	1,818.60
TOTALS:	$80,990.25	$73,929.28

The ODVA Director further reimbursed the participating veterans organizations $24,996.00 during fiscal year 1984-85 for operation of the Southern Oregon Veterans Outreach Center, resulting in a total State financial aid to veterans organizations during the 1983-85 biennium, of $179,915.53. It is a matter of ODVA records, that out of the $73,929.28 of State financial aid which went to the veterans service organizations service office functions during the 1985-86 **one year period**, that approximately $56,000.00 (**76%**) of it represented "salary expenses" to pay veterans organizations service officers, etc. The funding support for said State aid comes directly from the "earnings" of the deeply financially troubled Oregon Veterans Home Loan Program, mostly without the knowledge of participants in said Home Loan Program. Additionally, concerning such state subsidies, The Detroit News newspaper did a three part series commencing on November 11, 1987, entitled "The Veterans Fraternity" (see **EXHIBIT "C"**).

SOME OTHER STATES HAVE REJECTED CONCEPT OF STATE AID

TO VETERANS ORGANIZATIONS BECAUSE STATE HAS NO CONTROL OR DIRECTION OVER SUCH ORGANIZATIONS' FUNCTIONS

During 1946, the Veterans of Foreign Wars (VFW) commenced a legal action against the State Auditor of Oklahoma (see VFW v. Childers, State Auditor, 197 Oklahoma Reports 331), in order to compel him to appropriate state funds to the VFW. The State Auditor, State Treasurer, and the Attorney General took the position that the appropriation was not legal and valid. The State Court determined that the appropriation of such funds did not constitute a **public purpose**, and that:

> " . . . when such organization functions by its own management entirely separate from control or direction by the state, it is as to the state a **private corporation** and the Legislature has no constitutional authority to appropriate public funds of the state to corporation, or to be expended by and through the corporation, in aid of the carrying out of its functions or some part of them, because such an appropriation would be in the nature of a **gift of public funds** within the meaning of section 15, art. 10, of the Constitution."

STATE VETERANS' DEPARTMENT DIRECTOR AWARE OF DECISIVE ROLE WHICH "ADVISORY COMMITTEE" HAS IN HIS FUTURE

An example of the fact that the present ODVA Director is aware of the power of the "Advisory Committee", is evidenced by the transcript of proceedings of a December 13, 1985, "REGULAR MEETING OF THE ADVISORY COMMITTEE TO THE DIRECTOR OF VETERANS AFFAIRS", wherein ODVA Director Jon A. Mangis indicated (page 46) that:

> "I would like to say that it's been about a year since I was notified that **I had the appointment**, and **you folks met and approved that**, and I really do appreciate the work that you've done during the past year, and the support that you've given . . . But I do appreciate everything that you've done for me, and the help that you've given me, and the support."

ODVA AND NATIONAL VETERANS ORGANIZATIONS OPPOSE ASL PASSAGE

It is a matter of hearings records of the Oregon Legislature, that ODVA was opposed to the passage of HB 2769 (ASL) during the legislative process, regardless of the testimony of aggrieved Oregon veterans which VDP caused to appear before legislative hearings, evidencing the need for passage of the bill.

The majority of the national veterans organizations were also in opposition to ASL as evidenced by the testimony of Mr. Carl Gustafson, the Chairman of the United Veterans Groups of Oregon (UVGO). Included among the member organizations of UVGO were the

American Legion, Disabled American Veterans, Veterans of Foreign Wars, etc. Mr. Gustafson appeared before the Oregon "Interim Committee on Judiciary" on December 6, 1985 (page 24 of said hearing record), and indicated, in part, that:

> " . . . he wanted to report to the committee what they have done with respect to this measure. United Veterans Groups of Oregon has 8-10 member organizations, including most of the groups represented here today. He apologized for their organization not being on the ball when this bill passed. He said they didn't realize it was being passed until it reached the Governor. **They then went to the Governor and asked him not to sign it.**"

FEDERAL OFFICIALS, KNOWING VA/"IRON TRIANGLE" SYSTEM OF "JUSTICE" CANNOT SURVIVE MEANINGFUL LEGAL SCRUTINY, FEAR PASSAGE OF OREGON ATTORNEY SERVICES LAW

The concern of "federal officials" regarding the passage of ASL was evident, as expressed in a front page story which appeared in the September 5, 1985 edition of The Stars and Stripes newspaper. That story, entitled "Oregon Will Pay Vets' Legal Fees", made reference to VDP as being:

> " . . . the national leader in efforts to overturn the VA's limitation on outside legal counsel . . ."

and indicated that:

> "Federal officials consulted universally hope that the state can **find some way of burying the legislation** because a new Oregon-VA court battle is the likely outcome."

FEDERAL AND STATE OFFICIALS REQUEST AN OPINION FROM THE UNITED STATES ATTORNEY GENERAL, TO DETERMINE IF "THIRD PARTY" INVOLVEMENT, VIOLATES THE VA $10.00 LIMIT ON ATTORNEY FEES

It is the opinion of VDP that one of the tactics employed by such concerned Federal officials and ODVA, to at least temporarily "bury"/**DELAY** the implementation of the law, was to request an opinion from the U.S. Attorney, concerning a potential conflict between ASL and 38 USC 3404, 3405. The opinion was requested on August 22, 1987, and when issued by the U.S. Department of Justice on January 28, 1986, determined that such "third party involvement" as contemplated by the new Oregon statute did not violate said federal statutes.

VDP believes that federal officials and ODVA knew prior to an opinion being requested, that ASL was not in conflict, for the obvious reason that had the U.S. Justice Department determined that payment of attorney fees by the State of Oregon (a "Third Party"), were in violation of the VA $10.00 limit on attorneys fees, that questions would have been certain to arise concerning the **true motivations** of the Federal Government in prohibiting a concerned third party, from paying for the legal representation of an aggrieved veteran. The federal government knew that it had no legitimate interest in prohibiting a "third party" from paying an attorney to represent a veteran concerning a VA case. VDP believes that the primary purpose of said federal statutes today, is to prevent meaningful legal scrutiny into the VA system, for the reason that said system could not survive such scrutiny.

STATE VETERANS' DEPARTMENT DIRECTOR MAKES REQUEST TO GOVERNOR'S OFFICE, TO BE GRANTED A WAIVER FROM OREGON'S COMPETITIVE BIDDING LAW, ALLOWING DIRECTOR TO CHOOSE WHICH "PRIVATE" ATTORNEYS WILL RECEIVE STATE CONTRACTS

After the passage of the Oregon Attorney Services Law, the Oregon Department of Veterans Affiars, pursuant to Oregon's "Competitive Bidding Laws", placed a notice in the State Bar Bulletin concerning the passage of ASL, and requested that interested attorneys contact ODVA. Approximately 50 responses were received from law firms throughout Oregon. At that point in time, ODVA made a request to the Executive Department of Oregon Government, that ODVA be granted a waiver from the requirements of the competitive bidding process in awarding the ASL contracts, and simply be permitted to award said contracts as ODVA wished. The record shows that 2 attorneys ultimately received contracts, one a former ODVA veterans benefits counselor, and the other a former VA attorney. It is interesting to note that appearing in the November 5, 1987, trial transcript of the National Association of Radiation Survivors (NARS herein) v. Turnage No. C 83-1861 MHP, volume 23, page 4572, is the following statement by NARS attorney Mr. Romaniw to the Court, while Mr. Romaniw was cross examining Mr. Weerts, one of the two Oregon attorneys awarded the ASL contracts, and who appeared as a witness for the government during said trial:

> "Mr. Romaniw: Well, your Honor, the purpose is that the -- we'd like to show that the ODVA, the Veterans Administration, and the service organizations are one **triangle**, are one large circle, and that they are -- there's **a very close nexus** to all three of them, and that Mr. Weerts, as a contract employee of the Oregon Department of Veterans Affairs, is **more like a VA employee than as an individual contractor.**"

It is also interesting to note that during Mr. Weerts cross examination by Mr. Romaniw, that Mr. Weerts indicated (see page 4587 NARS transcript, November 5, 1987) that:

> " . . . I am not hostile to service orgnizations. I regard them as allies, and so **I do not automatically revoke their**

> **representation**. The point about this is that **the power of attorney REMAINS INTACT**, and I come in as a limited power of attorney which VA regulations permit, to represent the veteran for a specific claim."

In a situation such as that described above, it appears as though the people of the State of Oregon are paying twice, inasmuch as **BOTH** the veterans service organization and the ASL attorney, are being paidat the same time, for "representing" the veteran against the VA.

ODVA DETERMINES THAT ELIGIBILITY FOR ATTORNEY SERVICES UNDER ASL, DOES NOT INCLUDE THE WIDOWS OR CHILDREN OF DECEASED OREGON WAR VETERANS

The attached letter from ODVA to Kathleen Anderson-Tucker, dated July 9, 1986 (see **EXHIBIT "D"**),, indicates that her application for protection under ASL was denied by ODVA because:

> "ORS 406.410 authorizes attorney services for war veterans who are **residents** of Oregon. Your application was made on behalf of the veteran's children. Only applications **submitted BY THE WAR VETERAN** can be approved for the Oregon Attorney Assistance Program."

Thus once again, the true concern of ODVA officials for the veterans of the State of Oregon, **and their families**, is revealed. Why would ODVA provide service-officer representation to widows and children of deceased war veterans concerning virtually all aspects of their dealings with the VA --- **except** --- the new ASL? Said matter is a part of the NARS v. Turnage (C 83-1861 MHP) trial transcripts on November 5, 1987, volume 23, page 4576-4577, as indicated in part, by the following questions by NARS attorney Mr. Romaniw, and answers from Oregon Attorney Services Law attorney Mr. Weerts, who appeared during said trial as a witness for the government:

> Q. Are widows eligible under the Oregon Statute?
> A. No, not to my knowledge . . . what counsel needs to understand is that the determination for eligibility under the program is not made by the attorney. It's made by the Oregon Department of Veterans Affairs.
> Q. And the Oregon Department of Veterans Affairs are the ones who construed the statute narrowly to preclude Oregon widows, correct? . . .
> Q. Well, as an attorney, you understand that **remedial statutes are to be liberally construed**, correct? . . . Mr. Romaniw to the Court: "And what I'm trying to show is that the Veterans service organizations, the Oregon Department of Veterans Affairs, all acted in concert to limit the effects of this -- to limit the effects of this program, especially as to -- as to widows.

ODVA CONFLICT OF INTEREST CAUSED BY SIMULTANEOUSLY RECEIVING FEDERAL VA SUPPORT PER 38 USC 3402 WHILE AT THE SAME TIME REPRESENTING VETERANS IN CASES AGAINST THE VA

VDP wrote a letter to ODVA Director Jon Mangis, dated December 2, 1985, in consideration of what VDP believed to be a conflict of interest caused by the federal VA possibly paying for all of the office space which ODVA uses in the Portland federal building, VA possibly paying the telephone bills (including long distance) of the ODVA Portland office, VA possibly paying for office equipment, supplies, etc., used by ODVA in its Portland office. We asked Mr. Mangis to tell us if the federal VA was in fact paying said ODVA bills. In a VDP letter to ODVA dated December 12, 1985, we also asked Mr. Mangis to obtain an opinion from the office of the Oregon Attorney General, concerning whether or not the present ODVA financial relationship with the federal VA, in any way constitutes a **CONFLICT OF INTEREST.**

STATE VETERANS' DEPARTMENT DIRECTOR REFUSES TO REQUEST OPINION FROM OREGON ATTORNEY GENERAL, CONCERNING POTENTIAL CONFLICT OF INTEREST CREATED BY ODVA RECEIVING FEDERAL VA FINANCIAL AID, WHILE AT THE SAME TIME PROVIDING REPRESENTATION TO OREGON VETERANS CONCERNING THEIR CLAIMS AGAINST THE FEDERAL VA

In a January 7, 1986, letter to VDP, Mr. Mangis indicated that:

> "It is difficult to understand your implications that provision of office space by the Veterans Administration is a conflict of interest. Our intent and "interest," as is theirs, is to assist veterans. Your statement that provision of office space by the Veterans Administration is a "**tether** which the VA now has attached to the veterans' organizations in order to control them" attacks the integrity of the Department of Veterans' Affairs and the service organizations. I feel this statement is unfair and totally unfounded. The office space is provided to facilitate assistance to veterans . . . "

On the second page of said letter, Mr. Mangis indicates that:

> "I do not feel that it is necessary to ask the Oregon Attorney General for an opinion on whether provision of space to us by the Veterans Administration constitutes a conflict of interest. There is absolutely no conflict of interest, as **our interests are the same**. Consequently, I do not feel that it is necessary to provide you information about what the cost of an office and telephone service would be were it not **provided** by the Veterans Administration. That information is not **relevant.**"

On February 10, 1986, VDP made a request to ODVA for said information, pursuant to ORS 192.410 - .500: "Inspection of Public Records." In response, VDP received an ODVA letter dated February 26, 1986 (see attached **EXHIBIT "E"**), indicating the level of federal financial support (free office space in the Portland Federal Building, free telephone service and long distance, free office equipment, etc.) which ODVA receives from the United States Veterans Administration, pursuant to 38 USC 3402. VDP continues to believe that ODVA cannot serve two masters, and that said state/federal relationship consitutes a facial conflict of interest.

UNITES STATES SENATOR FRANK MURKOWSKI INCORRECTLY QUOTES ODVA REPORT, ATTEMPTING TO SUGGEST THAT ATTORNEY INVOLVEMENT IN VETERANS' CASES IS NOT IMPORTANT

A Guest Editorial entitled "Second Thoughts on Removing VA Attorney Fee Limit", by US Senator Frank Murkowski, appeared in the May 18, 1987, edition of The Stars and Stripes newspaper. In said editorial (which is actually an excerpt from The Congressional Record), Senator Murkowski said, in part, that:

> "I rise to pay tribute to the thousands of service officers who on behalf of veterans service organizations . . . provide free expert assistance to veterans seeking help with their VA claims. These service officers serve all veterans who seek their help, irrespective of the nature of size of the claim. I speak today because of recent assertions that VA claims processing is unfair and the representation provided by veterans' service officers is unskilled and ineffective."

The Senator also indicated that:

> "I supported repeal during the 99th Congress; but, I believe that **recent reports** have shed new light on this issue. They should be **studied** and not ignored or summarily dismissed, just because they are not consistent with our positions."

The "recent reports" which Senator Murkowski believes to shed new light on the issue, concern, in part, the Oregon ASL, and the Senator makes reference to that law as follows:

> "A **report** by the Department of Veterans Affairs for the State of Oregon regarding a pilot program to overcome the $10 fee limitation indicates that the attorneys charged over $11,000 with no tangible results for veterans due to the attorney assistance. One attorney reported that in the cases **assigned** to him, many of which were Agent Orange and radiation cases, the work by veterans' service officers had been and I quote: Thorough and has left no stone

> unturned. I had no option but to go back over the same ground. All cases **that I have been assigned** have been fully developed. Service officers deserve credit for exhaustive and thorough work, and I should add that not one veteran expressed any dissatisfaction whatsoever for work done on their claims. End of quote."

Senator Murkowski indicated in his statement, that the "recent reports" should be "**STUDIED**." VDP agrees! The **OFFICIAL** Oregon report concerning ASL, appeared in a February 27, 1987, letter from Mr. Jon A. Mangis, the Director of the Oregon Department of Veterans' Affairs (ODVA), to the Honorable John Kitzhaber, President of the Oregon Senate. The **CONCLUSION** of said report indicated that:

> "At the time of this report, **we cannot access the value** of the legal counsel provided through ORS 406.410 - 406.430 since **no results are available to report.**"

VDP believes that it is also important to note that said report indicated that:

> "This test program has been in effect for 215 days as of January 31, 1987, with no award of disability benefits. **There have been no "personal hearings" or written appeals prepared for the VA Board of Veterans' Appeals in Washington, D.C. by the attorneys.** The majority of time spent by the two attorneys has been in review of Veterans' Administration files on veterans they are representing."

It is true that in a portion of said "report," that the language which appears in the Senator's quote did appear, but it is very important to note that, in so doing, Mr. Mangis was quoting a portion of a five month old "monthly status report" letter dated **October 8, 1986**, prepared by Mr. James L. Weerts, who is one of the two attorneys who had contracted with ODVA to provide representation to veterans pursuant to ASL. The same quote from Mr. Weerts also appeared in an ODVA **"Interoffice Memo"** dated February 20, 1987, from Mr. Thomas A. Weiss, Counseling Supervisor, Veterans' Services Division, to Ms. Cher LaMar, Assistant Administrator, Veterans' Services Division.

VDP believes that a more meaningful indicator concerning the status of the ASL **at that point in time**, appears on page 14 of the ODVA "Report to the Advisory Committee" dated September 25, 1986 (13 days prior to Mr. Weerts October 8, 1987, letter). In said report, Mr. Lyall Fraser, Administrator of ODVA Veterans Services Division, indicated that:

> "The Attorney Assistance Program was implemented as scheduled on July 1, 1986. At the time of this report, **the program has NOT been in operation long**

enough to provide meaningful data."

At the point in time that Mr. Weerts (a former ODVA Veterans Benefits Counselor -- VBC -- and Trust Officer) wrote the October 8, 1986, letter, it is a matter of State ODVA "Attorney Assistance Monthly Report" records that ODVA had referred 14 cases to him, and that he had accepted 12 of those cases: 4 cases during July (ODVA commenced to implement and administer ASL on July 1, 1986), 6 cases during August, and 2 cases during September. VDP also finds it of interest that Mr. Weerts also indicated in said letter that:

> " . . . just about all of the veterans expressed praise and gratitude for the service officers, even though their particular claims had been **denied.**"

During the period of time VDP fought ASL through the legislative and implementation process, VDP was not aware of the Federal and State laws and other factors, which caused (and continue to cause) a facial "conflict of interest" to exist between the federal VA, the ODVA, and Veterans Service Office functions of certain Congressional Chartered national veterans organizations (such as the American Legion, Disabled American Veterans, Veterans of Foreign Wars, etc.). The "conflict of interest" in question, is caused by certain very close financial and other relationships between said groups, complicated by the fact that ODVA and said veterans service offices of national veterans organizations, provide **representation** to veterans concerning cases **against** the federal VA. It is the opinion of VDP, that said "conflicts of interest", effectively, caused the death of the Oregon ASL prior to its ever being implemented.

METHOD/SYSTEM THROUGH WHICH THE FEDERAL VA MAINTAINS A STRANGLEHOLD OVER THE STATE ODVA, CERTAIN CONGRESSIONALLY CHARTERED NATIONAL VETERANS ORGANIZATIONS, AND CONSEQUENTLY, THE FATE OF THE 1985 OREGON ATTORNEY SERVICES LAW

VDP believes that essential to an understanding of the "conflict of interest" between the Federal VA, ODVA, and Veterans service offices of some of the National Veterans organizations, is a knowledge of certain Federal Statute Laws, Oregon State Laws, as well as certain other "realities." It is the opinion of VDP that beginning in 1945 (more than 40 years ago), that many of the National/traditional Veterans' Organizations, and State veterans agencies/departments such as ODVA, who **should be** the protectors of veterans rights, were placed in a close financial relationship with the federal VA, which has, ironically, resulted in America's war-injured defenders (said veterans organizations rank and file members) being stripped of the basic constitutionally guaranteed due process of law legal protections, and all meaningful access to the "**AMERICAN SYSTEM OF JUSTICE**" (access to the courts: see 38 USC 211(a), and the right to counsel: see 38 USC 3404, 3405), which said veterans organizations rank and file members went to war to protect for every other American citizen. Some of the laws in question are as follows:

1. On June 22, 1944, the United States Congress passed the "Servicemen's Readjustment Act of 1944" to provide Federal Government aid for the readjustment in civilian life of returning World War II veterans (see 58 Stat. 284). On December 28, 1945, Congress amended the above cited law (see 59 Stat. 623) by, in part, amending Section 200 by ADDING the following new subsection:

> "(c) The Administrator is further authorized at his discretion and under such regulations as he may prescribe to **FURNISH**, if available, **NECESSARY** space and suitable office facilities for the use of paid fulltime representatives of such organizations (American Legion, Disabled American Veterans of the World War, Veterans of Foreign Wars, etc). (see current 38 USC 3402)

It was a noble and praiseworthy gesture of patriotism and a desire to help the millions of World War II veterans returning from the war, which prompted the National Veterans Organizations to help the federal government, during crisis period after the war. But what happened after all of the veterans were home, and the crisis of medical problems, education problems, etc., were resolved? The veterans organizations, by that time, had VA paid office space, VA paid telephone service, office furniture, etc., in the federal buildings across the United States, but the law, as it existed at that time, clearly contemplated the NECESSITY which justified the free office space to veterans organizations, as being the emergency created by the end of World War II, and clearly provided that the VA paid space for veterans organizations, must be "NECESSARY!"

Regardless of the fact that the law provided that the VA paid office space, etc., to the veterans organizations, must be "NECESSARY," the situation continued after the emergency had passed. Finally, on June 17, 1957, Congress passed the "Veterans Benefits Act of 1957" (see 71 Stat. 83), "To consolidate into one Act, and to simplify and make more uniform, the laws administered by the VA relating to compensation, pension, hospitalization, and burial benefits, and to consolidate into one Act the laws pertaining to the administration of the laws administered by the Veterans' Administration." This Act, as it appears in "THE STATUTES AT LARGE" is 93 pages long, but of interest is the fact that the word "NECESSARY" was **deleted** from the language of the law as it had previously existed (what is now 38 USC 3402), thus the VA paid office space for the national veterans organizations, State of Oregon Department of Veterans Affairs, etc., no longer had to be "NECESSARY." It is the opinion of VDP that the federal VA was well aware of the potential power (of the purse) which it had over the **leadership** of the national veterans organizations (the rank and file membership of such organizations to this day, do not fully understand that they have been stripped of basic legal protections of American citizenship, which they served America to preserve and defend).

The veterans organizations were seemingly secure in their function of representing veterans in their claims against the VA, even though the VA budget was, and is, paying millions of dollars nationally, to provide free office space, telephone service, etc., to those same organizations. The fact that the Federal VA has its own Veterans Services Division, which provides free representation to Veterans concerning their VA claims, apparently made no difference to lawmakers who understood what was going on. Many people consider the relationship between the VA and the veterans organizations, to be a CONFLICT OF INTEREST on the face of it. Veterans who seek representation from the veterans organizations, assume that those veterans organizations exist on an **adversary** basis concerning the VA, and that such organizations will fight to protect their legal rights. Service officers are not required to apprise the veterans whom they represent, of a potential conflict of interest, created by the fact that the VA is paying for their offices in the Federal Buildings, telephone bills, provides the office furniture, etc.

VA PANICS DURING 1986, WHEN U.S. SENATE VOTES UNANIMOUSLY AND 233 MEMBERS OF HOUSE OF REPRESENTATIVES DECIDE ITS TIME TO RESTORE FIRST CLASS CITIZENSHIP TO AMERICA'S WAR INJURED VETERANS

During 1986, the entire U.S. Senate and 233 Members of the House of Representatives decided that it was time that VA Judicial Review legislation be passed. But the VA, knowing that its system could not tolerate meaningful judicial scrutiny, panicked, and consequently originated a letter dated June 5, 1986, from the "Office of Congressional and Intergovernmental Affairs" Director Gail A. Gompf, which gives "An Overview of VA's Position" on Judicial Review (H.R. 585). On page 5 of the Judicial Review portion of that letter and attachments, appears the statement concerning what the effect of passage of the Judicial Review legislation, might cause:

> "Moreover, many special considerations currently extended to veterans service organizations may have to be curtailed. **The providing of VA space and facilities**, . . . could be affected by judicial oversight and increased represenatation by private attorneys."

It is clear to VDP, that the VA was seeking support from the veterans organizations, etc., and using a powerful financial threat (curtail aid authorized by 38 USC 3402) to attempt to help accomplish the defeat of the Judicial Review legislation --- and it worked! A Wall Street Journal article dated July 14, 1986 (see **EXHIBIT "F"**), indicated, in part:

> "He (Congressman Don Edwards) even thinks his friend, Sonny Montgomery, stacked recent hearings on the bill (VA Judicial Review) in favor of opponents. Further, he charges the VA virtually "**BLACKMAILED**" major veterans organizations into opposing the measure. A letter from a VA official warned these organizations they could lose their free space and telephone lines at VA regional offices if this proposal became law."

It is a matter of record, that Mr. Jon Mangis, the Director of the Oregon Department of Veterans Affairs, received a copy of the said VA June 5, 1986, "blackmail" letter (see **EXHIBIT "G"**), and initialled it. It is also a matter of the transcript of proceedings at a June 23, 1986, meeting of The Advisory Committee to the Director of Veterans Affairs, that Mr. Jon Mangis said:

> "I don't believe the Bill 585 as written is really what we want to see happen."

The Oregon Attorney Services Law, to a significant extent, relied on the national veterans organizations as a source of cases of VA abuse, and to, consequently, come under the protection of ASL. VDP does not believe that the national veterans organizations would intentionally focus the attention of the legal profession on egregious cases of VA abuse of power, for the simple reason that those organizations themselves rely, to a large extent, on the federal VA for their survival, both in terms of membership, federal and state aid, office space, telephone service and long distance, office equiment, office furniture, as well as many other "perks." You don't bite the hand that feeds you!

It is certain that certain Members of the United States House of Representatives understood what the VA was doing, as evidenced by a letter dated July 1, 1986, on the letterhead of the "Congress of the United States", from Rep. Don Edwards, Rep. Thomas Daschle, Rep. Lane Evans, and Rep. Bob Edgar, to the Editor of The Washington Post (see **EXHIBIT "H"**), which indicates, in part:

> "Further, the VA's commitment to an "informal and cooperative system" must be called into question **when the VA tells veterans' organizations that passage of judicial review legislation will result in the loss of the free office space, furniture, and telephone service presently provided to these groups in VA regional offices.**"

Finally, VDP requests that you review our testimony before the U.S. House of Representatives, Committee on Veterans' Affairs, on July 26, 1983, and again on June 25, 1986, concerning VA Judicial Review, as well as VDP testimony dated April 11, 1988, which was submitted into the record of the U.S. Senate, Committee on Governmental Affairs, concerning S.533, to establish the VA as an executive Department. Please let us know if you need any additional information or supporting documentation.

Please restore meaningful access to the "American System of Justice" to America's war injured defenders. They fought for it!

Sincerely,

Philip E. Cushman
National President

EXHIBITS "A" THROUGH "H" ATTACHED

EXHIBIT **A**

63rd OREGON LEGISLATIVE ASSEMBLY–1985 Regular Session

Enrolled

House Bill 2769

Sponsored by Representatives ROBERTS, GOLD, J. HILL, McCARTY, SPRINGER (at the request of Phil Cushman, Veterans Due Process Incorporated)

CHAPTER ....790........

AN ACT

Relating to veterans; creating new provisions; and amending ORS 406.030.

Whereas under current federal law a veteran making a claim for benefits from the United States Veterans Administration, or appealing an adverse decision concerning a claim, may not pay an attorney more than $10 for legal services and representation; and

Whereas this century-old fee limitation severely limits the ability of a veteran to obtain effective legal counsel; and

Whereas current federal law further provides that decisions of the United States Veterans Administration on any question of law or fact concerning claims for benefits for veterans, their dependents or survivors are final and conclusive and not subject to review by any other official or court of the United States; and

Whereas the United States Veterans Administration is unique among major federal agencies in that its benefit decisions are not subject to the scrutiny of the federal courts; and

Whereas this lack of effective legal representation and absence of judicial review often cause hardship and disillusionment among those who have defended our country; now, therefore,

Be It Enacted by the People of the State of Oregon:

SECTION 1. (1) The Director of Veterans' Affairs, on behalf of this state, may, with the agreement of the Attorney General, contract with attorneys for the provision by the attorneys of services as counsel for war veteran residents of Oregon in the preparation, presentation and prosecution of claims under laws administered by the United States Veterans Administration.

(2) Legal services shall be provided under a contract only for claims arising from or relating to:

(a) The status of the war veteran as a prisoner of war under circumstances described in ORS 481.223 (2);

(b) Damages suffered by the war veteran due to exposure to causative agents, as defined in ORS 408.305 (4) while serving on active duty;

(c) Damages suffered by the war veteran as a consequence of exposure to radiation during testing of nuclear weapons; or

(d) Service by the war veteran in any combat zone while the Armed Forces of the United States were engaged in armed conflict with military forces of another nation.

(3) Insofar as possible, the expense of services provided under a contract authorized by this section shall be paid by the state to an attorney from funds available to the Department of Veterans' Affairs.

(4) Attorneys who are parties to a contract authorized by this section shall be active members of the Oregon State Bar.

(5) A contract authorized by this section may allow law students enrolled in an accredited law school in this state, while under the supervision of a member of the Oregon State Bar, to participate in the preparation, presentation and prosecution of claims described in this section.

SECTION 2. The Director of Veterans' Affairs and county service officers appointed under ORS 408.410 shall institute a cooperative program with veterans organizations in this state to refer war veterans to appropriate state and federal agencies for the purpose of filing claims described in subsection (2) of section 1 of this Act and obtaining legal counsel and representation for such claims.

SECTION 3. The Director of Veterans' Affairs shall submit a report each year to the Legislative Assembly or to the Emergency Board, as appropriate, concerning the programs instituted under this Act. The report shall be submitted not later than March 1 in each year.

SECTION 4. ORS 406.030 is amended to read:

406.030. (1) The director, in the performance of [*his*] **the duties of the director**, shall organize and coordinate the administration of all present and future federal and state laws pertaining to war veterans and their dependents in this state. For such purpose [*he*] **the director** may establish such units or divisions as in [*his*] **the opinion of the director** will enhance the efficiency of the administration and promote the welfare of war veterans and their dependents. Any unit or division so established shall be directly responsible to the director and shall be under [*his*] **the supervision of the director**.

(2) The director, with the advice of the committee, shall promulgate such rules and adopt such forms as [*he*] **the director** deems necessary and expedient to carry out the provisions of ORS chapter 407 and ORS 88.710 to 88.740, 174.105, 273.382 to 273.386, 406.010 to 406.340, **sections 1 and 2 of this 1985 Act and** ORS 408.010 to 408.090.

Passed by House June 19, 1985

Ramona J. Kenady

Chief Clerk of House

Vera Katz

Speaker of House

Passed by Senate June 20, 1985

President of Senate

Received by Governor:

2:40 P.M. July 12, 1985

Approved:

2:20 P.M. 7-15 1985

Governor

Filed in Office of Secretary of State:

7:45 P.M. 7-15 1985

Deputy

Secretary of State

EXHIBIT **B**

CONGRESSIONAL QUARTERLY
Weekly Report

Vol. 38, No. 24 • Pages 1609-1688 • June 14, 1980

The Veterans' Lobby (1627)

Special Reports . . .

The Iron Triangle

Veterans' groups guard a $21 billion empire of federal benefits, aided by protective Hill committees and an entrenched bureaucracy. But the veterans' lobby enters the 1980s with some chinks in its armor: outspoken Vietnam veterans demanding their share, government budget-cutters, and a dwindling base of support in Congress. *(Page 1627)*

Healing on the Hill

The little known office of attending physician to Congress may have contributed to drug addiction problems of retired Rep. Dan Flood. *(Page 1658)*

Spending for Votes

Many federal candidates, particularly Ronald Reagan, will benefit from a surge in independent expenditures — a previously little used device to get around legal limits on campaign financing. *(Page 1635)*

Kennedy's Last Hope?

Sen. Kennedy faces another hurdle in his Carter challenge: a party rule requiring convention delegates to vote on the first ballot for the candidate under whose banner they were elected. *(Page 1641)*

Trucking Deregulation

A fragile agreement on legislation curbing federal trucking regulation is in danger of collapse. *(Page 1665)*

Second Thoughts on Ethics

Senate and House ethics codes face new scrutiny in the wake of criticism that congressional disciplinary procedures may be unfair. *(Page 1656)*

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Chinks in the 'Iron Triangle'?

How a Unique Lobby Force Protects Over $21 Billion In Vast Veterans' Programs

Anyone who doubts that veterans are unique among the interests that lobby Congress need only drop into one of the 58 regional centers of the Veterans Administration (VA), where the major veterans' groups share government office space with the bureaucracy that serves their needs.

Or, sit in on one of the annual congressional hearings where veterans present their legislative "wish lists" in an atmosphere so friendly that it is hard to tell the congressmen from the witnesses.

Or, review past votes on veterans' issues, and count the hard-line fiscal conservatives who draw the line on economizing at veterans' programs.

Or, watch the revolving door that interchanges top staff among the VA, the House and Senate Veterans' Affairs committees and the major veterans' lobby groups.

Programs that serve American veterans — at a cost of more than $21 billion a year — occupy a special place in the hearts of Congress. But they also are well protected by a traditional alliance of lobby groups, the veterans' committees and the VA — an alliance so invincible that "lobbying" hardly describes it.

Over time it has acquired its own nickname, "the Iron Triangle."

"It's a $21 billion private world that nobody pays any attention to," says Steve Champlin, a lobbyist for the Vietnam Veterans of America, a group that has tried more than once to break in.

Chinks in the Armor

But anyone who tours the Iron Triangle this year will also find some chinks in the panoply. The faces are changing, the issues are shifting, and the victories are becoming just a little less easy. Among the signs of change:

- Vocal groups of Vietnam era veterans, in and out of Congress, have been demanding that special attention be given to soldiers from that war. Traditional veterans' groups have recently begun shifting ground in a belated effort to embrace these concerns.
- The number of veterans in Congress is declining, and some longtime champions of veterans' causes are retiring. Congressional rules that have helped armor veterans' programs against amendment are now changed.
- Budget-consciousness, in Congress and the administration, has begun to chip away at the once sacred veterans' programs. After 17 straight years of being more generous than the White House, Congress, in its pending fiscal 1981 budget resolution, sets a veterans' budget target lower than the president's request.
- Afraid of losing clout, the Veterans of Foreign Wars (VFW) this year became the first veterans' group to organize a political action committee, abandoning its political neutrality to endorse and contribute to congressional candidates.

—*By Bill Keller*

"I think veterans' groups start out in a special category. I think the average member of Congress puts the veteran on a pedestal."

—Max Cleland,
Veterans administrator

Birth of a Giant

The first official American declaration of a special responsibility for veterans was a proclamation by the Pilgrims who settled Plymouth Colony. In 1636, they established a draft in case of war overseas, and provided that "if any that shall goe returne mamed and hurt, he shall be mayntained competently by the colony duringe his life."

Since then, veterans' programs have multiplied, reorganized and expanded to the point where the VA estimates that 41 percent of the American population is now "potentially eligible" for benefits available to veterans and their families.

From a compassionate gesture toward the "mamed and hurt," America's commitment to veterans has grown to include:

- The nation's largest health care system, with the bulk of the services going to veterans without service connected disabilities;
- Drug and alcohol counseling;
- Jobs programs, including a preference in federal hiring;
- Pension and disability benefits;
- Education stipends for veterans and their families;
- Federally guaranteed home loans; and
- Life insurance and burial services.

The Veterans Administration, which celebrates its 50th anniversary in July, now has more permanent employees than any federal agency except the Department of Defense.

And the modern veterans' lobby

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has played a role in much of that growth.

Washington Lobbyists

The American Legion was the first of the major groups to deploy lobbyists; in 1919, at the group's first convention, the members voted to establish a Washington office the following year.

The Legion was instrumental in obtaining government hospitals for World War I veterans, and in 1944 played a leading role in pushing the GI Bill through Congress, giving returning soldiers the right to a college education at government expense.

The VFW opened a Washington office in the 1930s, and helped orchestrate a massive demonstration of World War I veterans unsuccessfully demanding a bonus payment to help them through the depression.

These two groups, along with the Disabled American Veterans (DAV) and a smaller, post-World War II organization called AMVETS, make up the so-called "Big Four" — though congressional aides frequently refer only to the "Big Three" of the Legion, the VFW and the DAV. *(Box, p. 1629)*

A Special Category

The strength of the veterans' organizations does not depend alone on the sophistication of their Washington representatives; it comes from their enormous size and narrow focus, building on their special status in the eyes of Congress.

"I think veterans' groups start out in a special category," said Max Cleland, administrator of the VA. "I think the average member of Congress puts the veteran on a pedestal."

The major veterans' groups have at least one outpost, often several, in every congressional district in the country. These posts are primarily social gathering places, and sources of aid for veterans wrestling with the VA bureaucracy.

But they also are a potent grassroots political force on issues that touch veterans' pride or pocketbooks.

The Legion, the largest group with almost 2.7 million members, maintains a "legislative council" consisting of one legionnaire for each member of Congress, often a personal friend of the congressman. Three or four times a year, the council is called on to contact Congress on a veterans' issue.

The Legion and the VFW also are known for their ability to stuff congressional mailboxes when a vote looks at all close.

"It really is not hard for us to generate half-a-million to a million letters on an issue," said VFW Executive Director Cooper T. Holt. For example, when Senate reformers proposed in 1977 relegating the Veterans' Affairs Committee to subcommittee status, the "Big Three" generated a mail campaign and a phone-in that jammed the Capitol Hill switchboard. *(Background, 1977 Almanac p. 781)*

A similar blitz in 1978 stopped an effort to dilute veterans' lifelong federal hiring preference. *(Background, 1978 Almanac p. 821)*

More frequently, the views of the major groups filter through to members of Congress informally, when congressmen make rounds of their districts.

"What makes the Legion effective," said Robert W. Spanogle, executive director of the group's Washington office, "is the guy a congressman sees in church or at the barbershop or the Rotary Club, who says, 'Hey, Charlie, what are you doing for the Legion?' "

Closed System

The job of the veterans' lobby has been made easier by the fact that their programs are born and bred in an unusually closed system.

Congressional committees, especially in the House, operate as unabashed advocates of existing programs rather than overseers. *(Committees, p. 1630)*

Veterans bills almost always come to the House floor under suspension of the rules, which requires a two-thirds vote for approval and permits no amendments. Longtime committee aide Francis W. Stover said he could not recall a single bill that has come to the floor open to amendment.

Senior committee members say this prevents the House's love of veterans from running away with the budget. "My problem as chairman has been to keep legislation off the floor that would bankrupt the country," Veterans' Chairman Ray Roberts, D-Texas, said in an interview.

House aides point to a $1 billion-a-year bill to give every World War I veteran a pension, a bill that has 93 cosponsors and would be hard for members to resist if Roberts didn't keep it bottled up in committee.

But critics point out the system also makes it almost impossible to second-guess the committee.

Sponsors of a psychological readjustment program for returning Vietnam veterans, for example, had to wait nearly eight years for the House committee to let the bill reach the floor. In the meantime, the Senate passed the measure four times. Even those who initially were doubtful of the program now praise it as long overdue. *(1979 Almanac p. 522)*

Likewise, liberal members of the House committee have pressed for a "voucher" employment program, which would let a veteran use the last year of his GI Bill education benefits to reimburse an employer for first-year wages. Roberts squelched the proposal in May in a subcommittee by only two votes. Proponents probably will not get a chance to take their case further.

A new House rule this year forbids bills costing more than $100 million from being considered under suspension of the rules, a change reformers believe may open up the system. But Roberts has been successful so far in obtaining waivers to continue keeping his legislation amendment-proof. Rep. G. V. (Sonny) Montgomery, D-Miss., who likely will succeed Roberts as chairman next year, said he intends to continue the practice.

Courts Kept Out

The "Iron Triangle" also is closed to court review under an unusual federal law that exempts VA decisions from lawsuits. The law, instead, sets up an internal appeals procedure designed to favor the veterans; it also says a veteran cannot be represented in these proceedings by a lawyer who charges more than $10 for the service.

Designed to prevent veterans from being exploited by lawyers, the law has two other effects. It guarantees veterans' groups a more important role as the unpaid advocates of veterans, and it gives the VA a freer hand in interpreting the laws Congress writes.

Dean K. Phillips, Cleland's liaison with the service organizations and a longtime advocate of judicial review, believes the threat of lawsuits would force the VA to pay more attention, for instance, to veterans who claim health damage from exposure to atomic radiation or the toxic Vietnam defoliant Agent Orange.

He said one of the greatest obstacles to changing the law has been the service officers of groups like the American Legion, who fear the introduction of lawyers would diminish their own power.

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Veterans' Lobby Groups At a Glance

American Legion. With 2.7 million members and a million-member women's auxiliary, the largest veterans' organization. Open to men and women who served honorably during wartime. Officials say about 750,000 of their members are from the Vietnam era. The Legion has three registered lobbyists in Washington.

The group has taken stands on 120 issues, many (school prayer, synthetic fuels and child care, for instance) far afield from veterans' programs. Congressional aides say the Legion only has a serious impact on issues — specifically veterans' issues — where their massive membership gets riled. Because the organization is huge, heavily bureaucratized and slow to change, even a friendly congressional aide described it as "a sleeping giant."

Veterans of Foreign Wars. Oldest major veterans' group, founded in 1899, the VFW has 1.8 million members and an auxiliary of 620,000. Members must have served overseas in time of war. The group says its largest contingent, 500,000, served in Vietnam.

The VFW has four lobbyists, who work on veterans' and national defense issues. They have been active opposing the Carter administration on the Panama Canal and SALT II treaties, and defense spending. ("Anything involving the Soviet Union we're very skeptical of," said Executive Director Cooper T. Holt.)

The group is known for its cantankerous conservatism; one veteran describes it as "the most chauvinistic in all senses of the word." The group still is conducting a running battle against the Equal Rights Amendment, a campaign initiated to get even with feminist groups for challenging the veterans' preference in federal hiring. The VFW was the last major group to admit women veterans (in 1978). At the VFW's 1980 legislative conference in Washington, wives were confined to the balcony.

VFW this year became the first veterans' group to endorse and contribute to political candidates, mostly conservative candidates.

Disabled American Veterans. The group claims 666,609 members, who have service-connected disabilities, have won the Purple Heart or been prisoners of war. The fastest growing of the "Big Three," the group says Vietnam veterans make up a fourth of the membership, including 90 percent of the service officers who help veterans with government claims. The DAV has four lobbyists, who work exclusively on veterans' issues.

Because of an early and extensive "outreach" program to help Vietnam-era vets, DAV frequently is cited by the Veterans Administration and congressional staffers as the most progressive of the Big Three. A lobbyist for the liberal Vietnam Veterans of America calls the group "light years ahead of the other organizations as far as Vietnam veterans."

Others: AMVETS (for American Veterans of World War II, Korea and Vietnam), with 150,000 members, is sometimes counted the fourth in a "Big Four;" Paralyzed Veterans of America, with 11,000 members, and Blinded Veterans Association, with 2,700, are among the more active of the smaller groups that lobby on specialized veterans' concerns.

Vietnam Veteran Advocates

Vietnam Veterans of America. With only 1,400 members, and roots in the anti-war, pro-amnesty movements, the group's principal strength has been publicizing what it considers special problems of Vietnam era vets — unemployment, psychological readjustment difficulties, and exposure to the defoliant Agent Orange. Two lobbyists work with Vietnam era veterans in Congress on these issues, but the group has made its greatest impact through newspaper interviews with Executive Director Robert O. Muller, an articulate Marine Corps veteran paralyzed in Vietnam.

Partisans of traditional veterans' organizations call the group "imposters" and "fly-by-night," and VVA organizers have launched a membership drive in hopes of bolstering their credibility.

"The reality of this town is, 'Until you've got 10,000 members, don't talk to me,' " said VVA lobbyist Steve Champlin.

Veterans Law Center. Not a membership organization, the center, affiliated with American University in Washington, has seven lawyers who concentrate on legal remedies for Vietnam era veterans. However, the center sometimes lobbies for clients on issues such as treatment of incarcerated veterans and judicial review of VA regulations.

Others: Several groups have focused attention on individual issues; typically, they are shoestring, nonmembership groups. As with Vietnam Veterans of America, their major successes have been in raising public attention. Among them are Agent Orange Victims International, headquartered in New York; the Milwaukee-based National Association of Black Veterans; and the Incarcerated Veterans Project, run in New York by the National Council of Churches.

—By Bill Keller

"This is clearly a question of greed on the part of some service officers," Phillips said. "They don't want any action for anyone but themselves, even if it hurts the veterans."

The Senate has passed a bill, strongly supported by the current administration, to allow court challenges of VA's interpretations of the laws Congress writes, but the House committee has stalled it because, Chairman Roberts said, it would "tie up the courts." *(1979 Almanac p. 391)*

Other Special Relationships

The self-contained world of veterans' affairs is cemented by other special relationships.

Certain groups "chartered" by Congress — the VFW, DAV and American Legion, for example — are entitled to free space and free use of the federal telephone system in VA facilities, to carry out their role as veterans' advocates in seeking benefits.

While the groups say they do not use this network for lobbying, it is indirectly valuable to the groups in keeping track of the agency.

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House and Senate Veterans' Panels. . .

"Do you know what night and day are?" says a Veterans Administration (VA) official, when asked to compare the House and Senate committees on veterans' affairs. It is an assessment echoed not only in the offices of veterans' lobby groups, but in the committees themselves.

Both the House and Senate Veterans' Affairs committees see their role as advocates for the nation's veterans, but they approach the job from sharply different perspectives.

The House committee, long dominated by Southern Democrats who served in World War II and staffed by graduates of the VA bureaucracy, has devoted itself to protecting traditional veterans' programs against inflation and innovation.

The Senate committee has a liberal Californian for a chairman and a former Peace Corps lawyer as chief counsel. The committee is more amenable to new programs, especially those aimed at Vietnam-era veterans, and more inclined — if just slightly — to look critically at existing programs.

House Committee

It is no surprise that traditional veterans' organizations feel more at home in the House committee, where the makeup has changed little in 25 years and the treatment of visiting veteran witnesses is effusively hospitable.

Chairman Ray Roberts, D-Texas, succeeded William Jennings Bryan Dorn, D-S.C. (1947-49, 1951-75), who succeeded Olin E. (Tiger) Teague, D-Texas (1946-79), with little change in the committee's tone or interests.

"This committee has very rarely done anything the veterans' organizations as a group have opposed," said Deputy Chief Counsel Francis W. Stover.

Chairman Roberts, in a sly dig at his Senate counterpart, added, "We have a little different philosophy over here. We are for all the veterans' groups and we don't like to play one off against the other."

In the House, the active members of the committee are divided into what one staffer called "the gang of four" — Roberts, second-ranking Democrat David E. Satterfield III of Virginia, ranking Republican John P. Hammerschmidt of Arkansas, and G. V. (Sonny) Montgomery, D-Miss. — and "the insurgents" — notably Reps. Thomas A. Daschle, D-S.D., Margaret M. Heckler, R-Mass., and Lester L. Wolff, D-N.Y.

The "insurgents" sponsor programs aimed at Vietnam era veterans. The "gang of four" usually holds firm. And because the committee brings its bills to the House floor under suspension of the rules, permitting no amendments, the "insurgents" have never been able to try their proposals on a larger audience.

Among the bills that have passed the Senate, but disappeared into the maw of the House committee, are measures extending GI Bill education benefits for Vietnam veterans and permitting dissatisfied veterans' to take claims against the VA to court.

A new program of psychological counseling for war-scarred Vietnam veterans passed the House last year, but only after a seven-and-a-half-year committee blockade.

"Roberts is a very conservative person," said an aide to one of the "insurgents." "He's very cautious to do anything that's new. Also, the Vietnam vets are the guys who threw their medals on the steps of the Capitol. They are not well received by the committee."

Roberts counters that the programs his committee has rejected are promoted by lobbyists who represent "a few dissenters, and some of them are not Vietnam veterans."

"I think the Vietnam veterans are entitled to everything they've gotten, and they've gotten a lot more than any other group," he said.

Critics also say the panel has been slow to enact benefits for post-Vietnam veterans.

Skirting the Veterans' Committee, the House May 21 passed an experimental package of education benefits to lure in new recruits; the measure, which includes some benefits that Roberts' committee denied to Vietnam era veterans, came as an amendment to a defense authorization bill. *(Defense bill, Weekly Report p. 1405)*

Montgomery, who praised the measure, cited it as one area he would like the Veterans' Affairs Committee to address next year, when he is expected to become chairman.

Observers of the committee say the most influential House staffer is chief counsel, Mack G. Fleming, a Georgian Army veteran, one-time VA lawyer, and former Dorn aide. He is backed up by a staff that is heavy with former VA career employees.

"The Senate staff consists of Capitol Hill pros," one lobbyist said. "The House staff are professional veterans."

Critics say Fleming teams up with entrenched employees of the VA to protect the status quo. One House aide, for example, claims when Fleming doesn't like a proposal he will get allies in the VA to give it an

For example, when the Carter administration admitted 13 Cuban psychiatric patients to a Tampa, Fla., VA hospital during the recent refugee crisis, a DAV volunteer on the scene quickly contacted DAV officials housed in the VA's regional office in St. Petersburg. An official there used his federal phone line to call headquarters in Washington.

There the DAV and other groups — complaining that the VA system already is too overloaded to admit "undocumented aliens" — contacted Reps. Roberts, Montgomery and Dan Mica, D-Fla., who put pressure on the VA to have the Cubans removed. The Cubans were out within four days.

Another thing that helps keep the system sympatico is an interchange of top employees among the lobby groups, the congressional committees and the VA. A few samples of the revolving door:

- Mack G. Fleming, chief counsel for the House Veterans' Affairs Committee, was a VA legislative liaison in the Johnson administration. At least four other high-ranking committee staffers were career VA employees.

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. . . As Different as 'Night and Day'

inflated cost estimate.

In the case of new education benefits for Vietnam veterans, for example, the VA has given cost estimates twice as high as the estimates of the Congressional Budget Office.

Roberts will retire at the end of the year, along with second-ranking Satterfield, who chairs the Medical Facilities and Benefits Subcommittee. Housing Subcommittee Chairman Jack T. Brinkley, D-Ga., may give up his panel to chair one on the Armed Services Committee.

Younger members have hopes that one of them — Robert W. Edgar, D-Pa., if he survives a tough re-election campaign — will get a subcommittee chairmanship, and that the old guard will loosen the reins.

But Montgomery is assured the chairmanship, and while he is viewed as more accessible by younger members, his creed differs little from Roberts'.

In an interview, Montgomery listed six priorities facing the panel next year. His list included all the concerns of the major service organizations — maintaining hospitals and nursing homes, pensions and disability compensation — but none of the measures sought by Vietnam veterans' advocates.

Senate Committee

The Senate Veterans' Affairs Committee is a relatively young panel, created in 1971 and almost reorganized into a subcommittee in 1977. The veterans' lobby scotched that idea, but the man who became chairman of the rescued committee, Alan Cranston, D-Calif., favored the reorganization as an efficiency and economy move.

As Senate Majority Whip, Cranston answers to a larger audience than the veterans' organizations. That, and the fact that he is liberal on defense issues, make him somewhat suspect as far as the veterans' groups are concerned. Cranston tries to reassure them by offering budget additions and pledging support in speeches to the annual veterans' conventions.

"Cranston wears his American Legion hat when he chairs the Legion's testimony," said a congressional aide, "but they don't really regard him as one of their own."

Veterans of Foreign Wars (VFW) director Cooper Holt, for instance, chastised Cranston for being too friendly with the administration, which the veterans' groups have singled out as the culprit in a running budget battle. Others are deeply suspicious of his support for national health insurance, though Cranston has vowed he would oppose sweeping the VA's separate hospital system into such a plan.

Norman Hartnett of Disabled American Veterans (DAV) is more sympathetic: "In the leadership, he's between a rock and a hard place. In all fairness, he's made a fair effort to take care of the veterans."

Cranston's principal staffer is Jonathan R. Steinberg, who plays such an important role that veterans' groups jokingly refer to the pair as "Sen. Cranberg."

In contrast to the House staff, Steinberg is a nonveteran who practiced law for the Peace Corps and the Senate Labor and Public Welfare Committee, a background that does not exactly put him on backslapping terms with the major veterans' groups.

"They seem to view us as liberals who have strayed into their pasture and are grazing for awhile, and they just hope we don't do too much damage," Steinberg said

Congressional aides say that while several other committee members are active, the power is firmly in the hands of Cranston and Steinberg. There are no subcommittees.

Though the Senate committee is more amenable to new ideas than its House counterpart, VA and other congressional aides say it still is strongly protective of existing veterans' programs.

Until this year's budget squeeze, for example, the panel ignored the pleas of the administration and the Senate Budget Committee to cut back benefits for flight training and correspondence schools — programs that rarely led to jobs — and to end free medical care for veterans who have no service-related health problems and can afford to pay.

Although the House and Senate panels differ in personality, said one administration official, neither provides the skeptical oversight that some other committees exercise in their jurisdictions.

"The administration can come up with all kinds of rational proposals," said the official, "but the bottom line is, those rational ideas aren't going to get a hearing. [The committees feel] it's not worth it to touch them."

Some veterans' lobbists think that's the way it should be.

"Those two committees should be advocates of veterans' programs just as the Labor Committee is an advocate of the working man, and the Commerce Committee is an advocate for businessmen," said Cooper T. Holt, executive director for the VFW.

—By Bill Keller

- Francis W. Stover, Fleming's deputy, spent 10 years as a lobbyist for the Veterans of Foreign Wars.
- The VA's chief counsel, Guy H. McMichael, came to the VA from a post on the Senate Veterans' Affairs Committee. Administrator Cleland also worked for that committee.

The revolving door is a long-established feature of the veterans' establishment. President Nixon chose the national commander of the American Legion to head the VA in his administration; President Ford picked the national commander of the VFW. Oliver E. Meadows left a 20-year position as staff director for the House committee in 1976, only to come back the next year and testify on legislation as national commander of the DAV.

Defense Mechanisms

The closed system works the way white corpuscles work in the bloodstream — engulfing and destroying foreign ideas.

For example, in 1977 the National Academy of Sciences released a $6 million study of the veterans' health care system in America. The report recommended that the VA gradually

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Vets in Congress Decline

The number of veterans serving in Congress has declined since Congressional Quarterly compiled a survey of all members in October 1977, though congressional veterans still outnumber non-veterans two to one.

An update of the 1977 survey shows that from the 95th to the 96th Congress, the number of members with military service dropped 6.2 percent. The number with service during wartime dropped 9.4 percent. Most of the decline came in the retirement or defeat of members with service during World War II.

Some 287 House members had military service, compared to 309 in 1977. In the Senate, 75 senators are veterans, down from 77 in the earlier survey. CQ's survey included military service in the National Guard and reserves as well as active units.

While the total number of Vietnam era veterans increased by more than 50 percent (to 46), their ranks are still thin, and only a handful of them actually served in Vietnam. *The Washington Post* reported in April that of the 103 men in the 96th Congress who were subject to the Vietnam era draft, all but four had draft deferments or served outside of Vietnam.

Advocates of Vietnam veterans suggest that Vietnam vets as a whole have not reached that plateau of economic security from which to run for office, and that many still have not recovered from their disenchantment with the political system that sent them overseas.

Despite the fears of veterans' groups that non-vets are less sympathetic to veterans' issues, it is hard to prove that members with military service are more likely to vote for veterans' programs — if only because there are few close votes on such issues. However, in one of the rare close votes on a veterans' bill, when the Senate in May voted against adding $600 million to the Veterans Administration budget, wartime veterans were, in fact, more sympathetic to the increase (26 to 23 in favor) than those with peacetime or no military service (24 to 19 opposed).

Following are the number of veterans in the House and Senate compared with the October 1977 figures:

	HOUSE		SENATE	
	June '80*	**Oct. '77**	**June '80**	**Oct. '77**
World War I	1	3	0	2
World War II	145	172	43	53
World War II and Korea	5	8	1	1
Korean era	31	32	5	5
Vietnam era	40	27	6	3
Other service	65	67	20	13
Total, veterans	287	309	75	77
Total, no service	146	126	25	23

* *Based on 433 representatives with 2 vacant seats*

—Research by Jennifer Greene

begin merging its health care with general community hospitals. This proposal horrified established veterans' organizations, which felt it would place them on the same footing as Medicaid and Medicare recipients.

The Senate Veterans' Affairs Committee held hearings at which senators and the VA announced their intention to let the "merger" idea go no further. The House committee generally ignored the report, except that senior members issued statements condemning the study as a plot by the Department of Health, Education and Welfare to take over the VA.

Asked three years later about the impact of the study, NAS staff director David Tilsen said, "It looks to me as though the real impact has been very small" except that "I think it's highly unlikely the Veterans Administration will ask the academy to do anything else."

"I obviously knew we were dealing with a sacred cow," Tilsen said. "One of the things I didn't really appreciate is how powerful the veterans' organizations turned out to be."

Veterans bills commonly pass with only a handful of "no" votes. Even fiscal conservatives frequently make an exception for veterans.

The billion-dollar World War I pension bill, which even House Veterans' Committee leaders consider a budget-buster, includes among its 93 cosponsors such avowed anti-spenders as Reps. Philip M. Crane, R-Ill., Trent Lott, R-Miss, and Robert Badham, R-Calif.

Freshman Sen. Gordon J. Humphrey, R-N.H., received wide publicity when, in his first few weeks on the Veterans' Affairs Committee, he attacked a package of veterans' health programs. *(Background, Weekly Report p. 297)*

His vote brought such an apprehensive reaction from veterans in his home state that Humphrey afterwards set up his own "veterans' advisory council," representing the "Big Three" and a World War I veterans' group, to help guide his future votes.

In May, Humphrey voted to add $700 million to the budget for veterans' programs, and the VFW now lauds him as one of the staunchest supporters of veterans' spending.

"A lot of my conservative colleagues, who would not vote for medical care for anyone else in the country if it were put to them, have no hesitation about the separate health care system for veterans, even though most of the men who use it do not have service-connected problems," said Rep. Anthony C. Beilenson, D-Calif.

Beilenson was the lone dissenter in a 406-to-1 House vote May 20 increasing special incentive pay for VA doctors and dentists. *(Background, Weekly Report pp. 1393, 1654)*

Vietnam Veterans

The Vietnam War created a major challenge to the established system, producing a generation of veterans who felt they had special problems.

They went away young to a war the nation scorned, and came back unheralded to a nation that wanted to forget. They came back with drug problems, psychological scars and few marketable skills. And with little trust

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of the government that got them into the situation, including its Veterans Administration.

A vocal campaign grew, drawing its most outspoken leadership from groups like Vietnam Veterans Against the War. The organizations that emerged — primarily Vietnam Veterans of America and the National Association of Concerned Veterans — have little proven constituency, but an impressive knack for attracting press attention.

In Congress, Vietnam era veterans organized a caucus (19 members, only two with actual combat experience) and took up the demands. They introduced legislation calling for an outreach program to counsel veterans with readjustment problems, new education and jobs benefits and compensation for veterans exposed to Agent Orange. *(Agent orange, background, Weekly Report p. 549)*

The proposals initially met with disinterest from most old-line groups and disdain from the House committee. Advocates of the changes say the older groups felt new programs would jeopardize existing benefits. Some of them also sensed an underlying dislike of soldiers who came home dissenters.

"There is a real antipathy for the Vietnam veteran in that committee," charges Forrest Lindley Jr., a former Green Beret who writes for the veterans newspaper Stars and Stripes. "It's sort of like a white community threatened with busing."

The first major breakthrough was passage in 1979 of a system of psychological counseling centers. Sen. Alan Cranston had pushed the proposal for eight years with no help from the service organizations except, toward the end, the DAV. *(Background, 1979 Almanac p. 522)*

Though veterans say the program is underfunded, initial reports in oversight hearings in May were strongly favorable; the VA said that veterans who have regarded VA hospitals with suspicion are flocking to the new storefront counseling centers.

Vietnam veterans also have won some ground on other issues — a tax credit for employers who hire economically disadvantaged veterans; a study of the health effects of Agent Orange; extensions on the time limit for using GI Bill benefits and loans. An additional time limit extension for vets with little schooling has passed the Senate, but is not included in a House bill. *(Tax credit, 1978 Almanac p. 221; GI Bill, Weekly Report p. 262)*

Closing the Gap

While the national media has focused its attention on the more articulate, liberal groups like Vietnam Veterans of America, the generation gap has been closing in the traditional organizations.

The American Legion now claims nearly 750,000 members from the Vietnam era, belying the popular notion that Vietnam veterans are non-joiners. About one out of every 11 Vietnam veterans belongs to the Legion, compared with one out of 10 World War II and Korea veterans.

The VFW claims more than 500,000 members from the Vietnam era. The DAV estimates about 150,000 Vietnam era members, including over 90 per cent of the DAV national service officers who help veterans file and contest their claims with the VA.

> *"The old-line veterans' groups, in my opinion, have been wrongly maligned. Their hearts have generally been in the right place."*
>
> —James H. Webb, minority counsel, House Veterans' Affairs Committee

All of the "big three" count Vietnam vets among their lobbyists.

"The old-line veterans' groups, in my opinion, have been wrongly maligned," said James H. Webb, a Vietnam combat veteran who is minority counsel to the House Veterans' Affairs Committee. "Their hearts have generally been in the right place."

There still is a rhetorical generation gap, but differences on issues are gradually becoming matters of degree and tone.

For example, in May oversight hearings, the Legion and VFW heaped praise on the psychological counseling program that Congress passed without their help. They also used far stronger language than in the past to demand thorough studies of the risks of Agent Orange. In a radical departure from past policy, the Legion proposed that the study be taken away from the VA and turned over to the National Academy of Sciences.

Three of the four largest veterans' organizations (the Legion is the exception) now support some form of judicial review of VA decisions, another dramatic shift. The VFW also has switched to supporting an additional extension of GI Bill benefits for Vietnam veterans.

"These are very forthcoming kinds of positions on Vietnam veterans' issues," said Jonathan R. Steinberg, chief counsel of the Senate committee. "The point, though, is that this is 1980. I think the record will show that we didn't have this kind of support on Vietnam veterans in 1970."

Survival Instinct

The "big three" seem to recognize, belatedly, that Vietnam veterans are the key to their survival. While their older membership is dying off — VFW, for one, estimates more than 50,000 older members die each year — Vietnam era vets are moving to the forefront.

"Only recently are Vietnam veterans starting to emerge into leadership positions in the Legion and VFW," said Rep. David E. Bonior, D-Mich., who helped organize the House caucus of Vietnam era veterans. "The ironic and very sad part of all this is that the greatest needs were during the period of readjustment."

A similar, though less dramatic, change is taking place in Congress, where the number of World War II veterans is declining and the number of Vietnam veterans increasing.

Among those who will leave at the end of this Congress are the two highest ranking Democrats on the House Veterans' Committee, Roberts and David E. Satterfield III, Va., both regarded as champions of the VA establishment.

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At the same time, the overall number of veterans in Congress is declining, according to a survey by Congressional Quarterly. *(Box, p. 1632)*

Veterans groups fear this will mean a fading interest in veterans.

"I'm very concerned about the composition of the next and succeeding Congresses," said Norman Hartnett of the DAV. "We're getting more and more members who are not in touch with veterans, most of them not having served in the military. The further you get away from a war, the less desire there is to do much about veterans."

Up Against Austerity

Already the veterans' budget has been nicked in Congress by the Grim Reaper of austerity, an unfamiliar experience for the veterans' lobby.

Ever since the congress began setting budget ceilings for itself in 1974, Roberts and Cranston have had little trouble amending the budget resolutions to accomodate expanding veterans' programs.

This year, things were a little different. While the Senate voted in May to add $300 million in budget outlays to the amount its Budget Committee wanted for veterans, it balked (by two votes) at upping the figure to $600 million. In the House, Roberts failed to get a rule allowing him to offer a budget-boosting amendment. *(Weekly Report p. 1309)*

The veterans' budget target of $21.2 billion agreed upon by House and Senate conferees is $200 million below the adminstration request.

To meet the guidelines, the House and Senate Veterans' Affairs committees have begun chipping away at some programs the Carter administration and the Budget committees have claimed for years were wasteful. The committees seem likely to reduce or eliminate education benefits for correspondence school courses and flight training, which studies have shown produce few jobs and invite abuses. They also seem likely to permit the VA to require non-service disabled patients to pay for treatment in VA hospitals if they have insurance or other means to pay.

Congressional budget aides point out that the Veterans' committees have accepted these economies only reluctantly.

One Senate aide contrasted the veterans' budget situation with the Senate Agriculture Committee, where advocates of food stamps and child nutrition programs — faced with an austerity year — cooperated in making more than $1 billion in budget cuts. "The veterans don't seem to feel that political necessity," the aide said.

Medical System

What most terrifies veterans' groups is the possibility that some day — either in a budget move or as part of a national health insurance plan — their unique hospital system will be opened to non-veterans and lose its special identity.

Because about two-thirds of the VA budget consists of pensions and disability compensation payments regarded as untouchable entitlements, the only major target for budget watchers is the VA medical system.

Medical care is the worst irritant in relations between veterans' groups and the Carter administration, relations that started out cool with Carter's pardoning of Vietnam draft evaders and worsened with his promotion of the Panama Canal and SALT II treaties and defense spending cuts.

> *"Cleland has become not an advocate for veterans, but an apologist for this administration and a puppet."*
>
> —Norman Hartnett,
> Disabled American Veterans

Cooper Holt of the VFW declares that Carter is "the most anti-veteran president to ever sit in the White House. And Max Cleland is nothing but a pawn of the Carter administration."

Norman Hartnett of DAV concurs that "the Office of Management and Budget is really controlling the VA as far as I'm concerned. Cleland has become not an advocate for veterans, but an apologist for this administration and a puppet."

Both men point to the VA's declining share of the federal budget (the amounts have soared, but not as fast as overall government spending), and particularly to the decline in VA hospital beds, a drop of some 10,000 since the Ford adminstration.

Cleland responds that the administration has tried to focus medical resources on top priority problems — service-connected ailments, drug and alcohol abuse, psychological counseling, and nursing homes for the aged — and to substitute outpatient care for the "warehousing" of sick men wherever possible.

"You can no longer define medical care as a bed," Cleland said.

The Carter administration's policy has meant that veterans without service-connected disabilities — they account for 70 per cent of the VA's patients, and the bulk of the veterans' group membership — have had to wait for care or been turned away.

Congress so far has fought the Carter administration's efforts to impose lower personnel ceilings on hospitals, curtail dental benefits and free travel to hospitals, and to require that insurers fully reimburse the VA for all medical help where patients have coverage.

But Congress has permitted the decline in hospital beds and the policy of concentrating on the neediest veterans.

"Veterans groups always see the administration and the administrator as the bad guys wearing black hats, and the Congress as the good guys wearing white hats," said Cleland. "... We're entering a new phase where Congress is not going to be wearing the white hats all the time."

Vet Campaign Donations

The VFW's response to that has been to follow in the footsteps of business and labor groups, organizing a political action committee.

Holt said the PAC will endorse 100 to 125 "supporters of veterans' benefits and a strong national defense" this year, and give the candidates more than $200,000 raised in bingo games, raffles and spaghetti dinners at posts around the country.

Holt said the group also will encourage local posts to get out the vote, baby-sit for friendly voters, drive them to the polls, and do "whatever it takes" to keep friends in Congress.

The other big veterans' groups have so far been reluctant to follow suit. They say it could have a divisive effect on the membership, or could jeopardize the groups' special relationship with Congress and the VA.

But Holt contends political action is the only way veterans can hang onto what they've got.

"The others say they've got clout without a PAC," Holt said. Then, reciting the latest budget figures, he added, "They haven't showed me too much clout." ∎

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EXHIBIT **C**

Wednesday
November 11, 1987

The Detroit News

THE VETERANS FRATERNITY

FIRST IN A THREE-PART SERIES

U.S. veteran groups mark Veterans Day today with traditional rites. But beneath the celebration simmers a dispute over a key role some groups play in helping provide veterans with government benefits. Traditionalists like the system, saying veterans groups have a long history of distinguished service. Critics say tradition and antiquated laws create a wasteful relationship that is not necessarily in every veteran's best interest.

Partnership or antiquated, tangled mess?

Vet groups draw criticism for relationship with VA

By John T. Wark
News Staff Writer

Veterans organizations at their grass roots are membership oriented, patriotic and fraternal.

But at another level, the Veterans of Foreign Wars, Disabled American Veterans, AMVETS, Paralyzed Veterans of America and other groups are businesses.

They own greeting card operations and chains of thrift stores and publish glossy monthly magazines. Six-figure salaries are common among their executives.

At the heart of their businesses are the roles they play in a little-publicized system that helps about 1.5 million vets gain access to government benefits.

The private, nonprofit organizations are not part of the government. Yet they operate like an arm of the Veterans Administration and rely on public donations and federal and state subsidies to help vets who file disability, death, housing, education and pension claims.

- Monument to honor black patriots/**3A**
- Army to probe case of dead soldier/**8A**

Spokesmen for the VA and veterans groups call their relationship a "partnership."

Critics call it a mess. They ask whether veterans organizations should provide a service already offered by the VA or state agencies.

The system is antiquated, confusing and inefficient, they say.

"The whole structure of veterans affairs as its been operating for decades now in America is fatally flawed," said Robert Muller, president of Vietnam Veterans of America. "What is needed is an objective review of what the hell is going on."

Muller accused established veterans organizations and the VA of developing "an incestuous network" in which "the same people running the service organizations now run the VA to their advantage."

"They're working a multibillion dollar agency to enhance their own organizations," he said.

Veterans groups, led by such organizations as the VFW and the American Legion, lobby Congress to maintain their roles.

Leaders of the organizations have made it clear, for instance, that they want to keep a Civil War era law that prohibits lawyers from charging vets more than $10 for legal representation in service-related claims against the government. If lawyers were available to vets, however, far fewer vets might turn to the veterans organizations.

Please see Groups/10A

From page 1A

For most of the organizations, playing the role of lawyer in the VA system is crucial. Without that, say the spokesmen, the organizations might become little more than fraternities for ex-soldiers.

A human touch

The relationships between the VA and the veterans groups are close.

Four of the VA's 13 administrators have been former commanders of the VFW or American Legion. The present head of the VA has served the American Legion at the national level.

Critics say the established veterans groups use the VA partnership as a membership lure.

It would be "naive" to believe "that kind of representation isn't helpful in their membership," VA Administrator Thomas Turnage said.

But he also acknowledged the VA can deliver benefits to vets without the aid of the service organizations.

> "We're in business for one purpose: to serve the veteran, his widow, or his orphan."
>
> **Howard Vander Clute**
> National adjutant, VFW

"If we didn't have the veterans service officers, I'm confident we could provide the benefits," Turnage said. "But don't take that out of context. They provide a good service, and with a human touch."

Turnage said veterans derive a "psychic benefit" by having other vets, whom they often trust more than VA workers, help them.

The system's efficiency — or inefficiency — is unclear.

There are 27.6 million American vets. More than 1.1 million live in Michigan, which has the eighth-largest population of veterans in the United States.

In 1986, the VA handled 3.8 million claims for compensation, pension and education benefits for vets and their dependents. According to the VA, fewer than half were filed with the help of veterans organizations.

THE VETERANS FRATERNITY

Groups play legal role in VA system

Neither the VA nor the veterans groups know how much it costs taxpayers to help veterans.

Veterans organizations report to Congress only on the finances of their national headquarters. They do not include the finances of state or local chapters or of programs run with state subsidies.

The Internal Revenue Service also requires all tax-exempt, nonprofit groups, including veterans organizations, to submit annual financial statements. But none of the veterans organizations files a consolidated financial report that gives the bottom line on income and expenses for its national network of foundations, thrift store chains, poppy sales, posts, units or other affiliates.

> "We've never ever had a question about what we pay individuals."
>
> **Charles Joeckel Jr.**
> Executive director of DAV

When contacted by The Detroit News, the major veterans organizations declined to disclose their total amount of public support.

Salary figures

Most of the organizations also declined to release information on executive salaries.

But IRS records show executives in some veterans organizations earn salaries of $150,000 or more. The head of Disabled American Veterans, Denvel Adams, earned $223,789 in 1985, IRS records show. Other DAV executives received from $81,000 to $140,287.

In contrast, VA Administrator Turnage, responsible for a federal agency with a $27 billion annual budget, earns $77,400 a year.

Veteran leaders say that not all organizations pay high salaries.

For instance, the American Legion, the largest of all veterans groups — 2.7 million members — reported that its top three executives in 1985 received salaries of between $42,713 and $61,088.

Robert Spanogle, the highest-paid Legion executive, said the salaries reflect the Legion's sense of responsibility.

"If you are going to be a nonprofit organization, you have certain responsibilities," he said.

"For a staff member or the commander or the volunteer in your organization, just working for the organization itself is part of the mission and part of the satisfaction."

But DAV executive director Charles Joeckel Jr. defended the high salaries.

"We've never, ever had a question about what we pay individuals," he said. Joeckel, who earned $81,400 in 1985, said DAV salaries are low compared with the earnings of executives in for-profit businesses.

The DAV and the Paralyzed Veterans of America sometimes are criticized for using limousines, but they say the large cars are as accessible to handicapped members as special vans and are less expensive to rent.

Muller, who as president of Vietnam Veterans of America was paid a $45,577 salary in 1985, said high salaries are "offensive." Such expenses are signs that the organizations' leaders are out of touch with their membership, he said.

Accountability

Veterans groups have long been effective watchdogs of the VA medical system. But they are unaccustomed to being held accountable themselves, said Ken Berez, fund-raising director for Vietnam Veterans of America.

"Usually when that word 'accountability' comes up we like to use it in relation to the VA," he said. "We like to question the efficiency of the VA — not ourselves."

Berez said veterans organizations should be accountable, however, because they depend on tax dollars and charitable contributions.

Veterans organizations first became involved with delivering VA benefits in 1945. When U.S. soldiers returned from World War II, Congress allowed service organizations to help process benefit claims.

The system never was dismantled.

The VA provides free office space, desks, telephones and sometimes computers in its 58 regional field offices to virtually any veterans group. The free office space totals 248,803 square feet, which the VA estimates is worth about $2.9 million annually. In addition, the organizations lobby many states for even bigger support subsidies. Michigan lawmakers will give $2.8 million this year to 11 veterans groups.

Detroit [illegible]

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Filing process

Howard Vander Clute, the VFW's national adjutant, said the veterans organizations do "a great job" as advocates. They help vets get benefits they sometimes don't even know they have coming, and they help simplify the process of filing benefit forms, he said.

"We're in business for one purpose: to serve the veteran, his widow, or his orphan," he said. "We tell the government, 'You monitor the integrity of the VA medical and benefit system, and we're going to assist you.' "

In 1986, Congress appropriated $26.2 billion for the VA, including $15.5 billion for education, compensation and pension benefits for vets and their dependents. The rest was for hospitals, construction and operating expenses.

The VA, created in 1930, is required by law to help a veteran file for benefits.

The process was designed to favor the veteran whenever there is a doubt about a claim. Thus, it has long been held that lawyers are not necessary. All decisions of the VA are considered final; no VA decision is subject to court review.

In 1986, the agency counted 3.8 million active claims — the number of vets and dependents receiving benefits. Of those, about 1.5 million — 39 percent — were handled by veterans groups.

The agency's records showed that 429,843 claims — 11 percent — were handled by states with veterans affairs offices. Of the remaining 50 percent, the VA itself processed most or vets and their dependents filed forms unassisted.

The VA has 1,100 claims counselors in its 58 regional offices.

It also has certified 6,000 people outside the agency to represent vets in VA matters. About 1,000 work for state veterans affairs departments. But most, roughly 5,000, work for veterans organizations.

Each organization has its own service officers — specially trained claims counselors who substitute for lawyers in the VA system.

Thirty-three veterans groups hold the authority to act for vets who give them power of attorney.

Power of attorney

It is relatively simple in most instances for vets to file claims on their own, said Drew Mullen, VA deputy assistant general.

Ordinarily, vets should not require much more than advice, he said. The process is so weighted in their favor it should not be necessary to assign anyone the power to act as attorney. Spokesmen for veterans groups say they require the power of attorney to get confidential military records for a claim application.

Mullen said that practically the only time a vet might seriously consider an act as "extreme" as giving an organization the power of attorney would be when the VA rejects a claim and the vet wishes to appeal to the VA Board of Appeals in Washington.

In that case, a vet may want a lawyer hired by a veterans organization to represent him in the appeal. Veterans are stymied from hiring attorneys themselves because of the $10 fee limit, but lawyers may be hired by third parties — namely veterans organizations — to represent vets at board hearings.

Veterans organizations hold 1.5 million powers of attorney, and of the millions of claims handled by the VA annually, only about 40,000 are appealed.

Vets and lawmakers say that although fair to many vets, the system is unfair to others who require the expertise that lawyers can give in complex cases.

Hiring attorneys

Dorothy Lagarreta, executive administrator of the National Association of Radiation Survivors (NARS), hopes her organization will win vets the right to hire their own attorneys.

In 1983, the California-based association filed suit in federal court against the VA on behalf of veterans who had been denied benefits after claiming illnesses linked to atomic testing. As part of that suit, NARS said the vets needed to hire attorneys with experience in such cases.

Final arguments in the case were presented Friday, and the judge hearing the case is expected to hand down her opinion early next year.

The lawsuit could result in the removal of the $10 cap on attorney fees on the grounds that the cap is unconstitutional, at least in cases of ionizing radiation exposure.

Congress first placed the cap on attorneys fees in 1862 to prevent lawyers from fleecing Civil War widows. Because of the $10 cap and a law that prohibits judicial review of VA decisions, veterans with a service-connected complaint are the only class of people who cannot sue the government, Lagarreta and others com-

"If you're poor, on Social Security, or locked up in prison you can sue the government. Not if you're a vet," she said.

Lagarreta said veterans groups oppose such changes because it could shut off the flow of "perks" the groups get from the VA.

"It's a free ride with the VA for the service organizations. They have free offices, and they depend on the VA to get along," she said. "They feel if they demonstrate any indication that their work is not top-notch, their usefulness will decline, and their membership will then decline in numbers."

The VFW's Vander Clute disagrees.

"That's not going to put us out of business or lower our membership. We're very successful at what we do. Veterans will always turn to us," he said.

Veterans groups boast that their service officers know the VA bureaucracy as well as the VA's claims counselors. They say veterans service officers will go further to collect supporting documents for vets because they are members of the same group.

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Sometimes they may go too far, according to Los Angeles lawyer William G. Smith. He said he appeared at a hearing on behalf of a veteran to appeal a VA decision. Later the veteran received a letter from a veterans group falsely claiming it — not the lawyer — represented the vet at the hearing.

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back was injured when a 130
sand bag fell 10 feet and land-
top of him, says claims by the
rans organizations are exagger-
. He said he tried to seek VA dis-
lity benefits with the help of the
W and met with little success.

So Cushman took up his own case and also founded Veterans Due Process, an organization seeking to win vets the right to sue the VA.

"The grass roots membership" of the veterans organizations is in favor of permitting lawyers to represent veterans, but the leaders "don't want to derail the gravy train of free offices, telephones and everything," he said.

Gordon Erspamer, an attorney for the radiation survivors, said a VA memo he obtained shows that service officers in veterans organizations are not highly skilled. The VA analysis showed that 30 percent to 50 percent of all claims are too complicated for the veterans organizations to handle, he said.

Yet even VA officials refer vets to veterans groups for help.

"We feel that, particularly in cases of appeal and things like that, we would recommend that they get a service organization," said Blake Moore, an assistant VA service officer in Detroit.

Drawing criticism

The veterans organizations involvement in the benefit process also has drawn fire from state authorities who ask whether taxpayers should pay veterans groups to provide services they and the VA already provide.

According to the National Association of State Directors of Veterans Affairs, 39 states now have veterans affairs departments affairs that offer free help to vets filing claims.

Some of those states also subsidize veterans organizations to underwrite identical programs. And still other states, including Michigan, give grants to veterans organizations instead of funding a state office. State spending ranges from about $4 million a year to $500,000.

The National Association of State Directors does not know how much the states spend collectively to maintain their own programs or subsidize veterans organizations, said William Gregg, association president.

In Florida, where 59 state workers help vets file VA claims, veterans groups receive no money from the state.

"If the veterans organizations want to do it wildcat, they can pay their own way," said Lloyd Landemuth, the state program's assistant administrator.

"We have some that do that in Florida. Primarily for membership reasons. You can get a lot more members if you provide the service."

In Washington, D.C., Minnesota and Texas, a different arrangement exists: State workers have the power of attorney to act on behalf of veterans organizations.

The District of Columbia office, for instance, processes claims in the name of any of six veterans organizations, said Leo Anderson, director of the office. Or it can handle a vet's claim itself.

Confusing?

"It's a scrambled mess," Anderson said. "It's just grown up that way."

One side effect of the confusion, he said, is that it blurs who actually handles a claim. "A lot of states put together some figures that aren't true. A lot of things get fictionalized."

Ray Schultz, who worked for 30 years in Minnesota's veterans affairs

Ray Schultz, who worked for 30 years in Minnesota's veterans affairs office, also finds "the veteran thing is kind of an enigma."

Schultz sees nothing wrong with veterans organizations spending their own funds to help members file claims. But he does not believe taxpayers should support such programs.

"Morally," he said, "I've always felt that the service organizations should have their own services and that they should fund it themselves.

"The reality, politically, is that the states, because of pressure or guilt about veterans — or whatever — have succumbed to the lobbying of the groups."

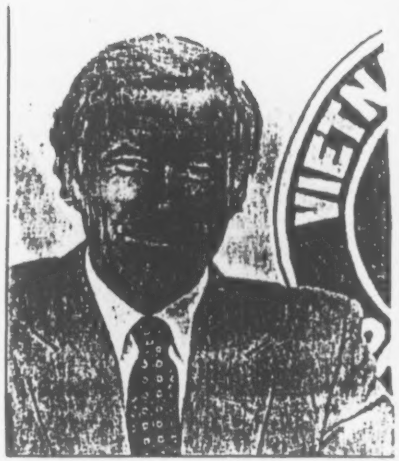
Gregg sees yet another possibility: "It would appear to make sense to say, 'Let's get together and do it cheaper, and maybe we'd provide a better, more efficient service.'

"But the veterans service organizations wouldn't buy it. Just for the reason that they want to keep their separate identities."

> "Usually when that word 'accountability' comes up we like to use it in relation to the VA. We like to question the efficiency of the VA — not ourselves."
>
> **Ken Berez**
> Vietnam Veterans of America official

Thursday: *Some of the nation's largest veterans organizations fail to meet standards set by charity watchdog groups.*

11/11/81 Page 484



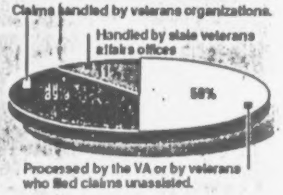
“The whole structure of veterans affairs ... is fatally flawed.

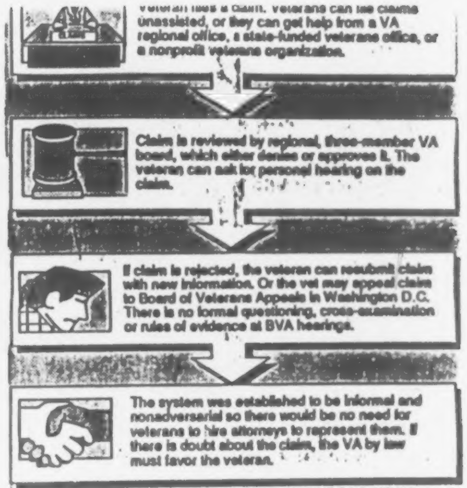
Robert Muller,
President
Vietnam Veterans
of America

Veterans benefits

Who files the claims

Nonprofit veterans organizations operate like an arm of the Veterans Administration, relying on public donations and federal and state subsidies to help veterans file claims. Critics say the role played by veterans organizations is unnecessary and confusing.





Veteran files a claim. Veterans can file claims unassisted, or they can get help from a VA regional office, a state-funded veterans office, or a nonprofit veterans organization.

Claim is reviewed by regional, three-member VA board, which either denies or approves it. The veteran can ask for personal hearing on the claim.

If claim is rejected, the veteran can resubmit claim with new information. Or the vet may appeal claim to Board of Veterans Appeals in Washington D.C. There is no formal questioning, cross-examination or rules of evidence at BVA hearings.

The system was established to be informal and nonadversarial so there would be no need for veterans to hire attorneys to represent them. If there is doubt about the claim, the VA by law must favor the veteran.

THE DETROIT NEW

Veteran membership

Here are estimated membership totals for various veterans organizations in Michigan and the nation.

Organization	Michigan	U.S.A.
American Legion	84,000	2,700,000
VFW	84,000	2,000,000
Disabled Am. Veterans	49,500	800,000
AMVETS	21,000	200,000
Vietnam Veterans of America	3,000	35,000
Polish Legion Veterans of Am.	3,000	15,000
Jewish War Veterans:	2,000	100,000
Military Order of the Purple Heart	1,800	15,000
Marine Corps League	750	25,000
WWI Veterans	600	50,000
Paralyzed Veterans of America	400	12,500
Total	250,050	5,952,500

Current year figures provided by veterans organizations.

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ember 13, 1987

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Detroit News
11/13/87

State funds charities' work

By John T. Wark
News Staff Writer

THE VETERANS FRATERNITY
LAST IN A SERIES

Eleven Michigan veterans groups receive state grants totaling $2.8 million to provide much the same service available from the Veterans Administration, according to a state survey.

The Michigan groups use the money to provide free help to veterans seeking housing, medical or other VA benefits.

However, each group largely serves its own members, prompting critics to ask if the state is paying for duplicate and unnecessary veterans support.

A state fiscal analyst reviewed the grants this year and said there "doesn't appear to be any relationship between the grant levels and program activity levels" of the groups.

He suggested the state develop a "rational formula" on which to base future handouts.

And officials in states where a single government agency provides claims assistance say their agencies often are more efficient in helping veterans than multiple veterans groups.

The fiscal analyst, Greg Owen, told the Legislature that because the 11 veterans organizations are providing duplicated services, too much money may be going to cover administrative costs.

More than 60 percent of the workers employed by the organiza-

Please see State/5A

State

Tax money helps veterans charities duplicate VA's role

From page 1A

tions are clerks or administrators. Fewer than 40 percent are actually service officers trained to help vets.

Veterans organizations worried that lawmakers might use the survey to tamper with the subsidies they have been receiving for decades, but the Legislature did not do so.

One lawmaker said he intends to pursue the issue.

"What I'm looking for is accountability for the expenditures of these state funds," said State Sen. Nick Smith, R-Addison, chairman of the Senate appropriations subcommittee on military affairs.

Smith asked the state Department of Military Affairs to conduct the survey after the 11th veterans group requested to be included in the grant program. The organization, Vietnam Veterans of America, won legislative approval in March.

Smith said his committee is "aware that there was a serious void in legislative oversight in what was happening to the money given to these organizations."

The survey, along with detailed certified audits, "is going to be the basis for deciding the level and justification for continuing giving them state money," he said.

More than a million vets live in Michigan, which has the eighth largest veteran population in the country. They represent 11 percent of the state population.

The eleven groups claim 250,000 of Michigan's veterans are their members. The VA distributed benefits totaling $752.6 million to Michigan vets and their families in 1985, the most recent year for which records were available.

Raymond G. O'Neill, state director of the VFW, said the state subsidy is worth it: The help given by veterans groups resulted in $123 million worth of federal benefits in 1986.

"You can see it's a good investment for the state of Michigan," O'Neill said. "It's the wisdom of the state legislators that they recognize what we do.

"It's no burden to taxpayers. And where else can you get that kind of return for your money? We bring a lot of money into the state."

Regional VA service director Richard Tuttle said the federal government does not attempt to track how many claims it handles, or to compare the number of VA-assisted claims to the number of claims filed through veterans organizations.

"I have no idea what their operations involve. It's none of our business. We don't pay their salaries, the state does," Tuttle said.

O'Neill said eliminating the help provided by the VFW and other groups would quickly stem the flow of federal dollars into the state. Overall, federal benefits could plummet 18 percent, he said.

Tuttle, however, believes it would mean more veterans would turn to the VA for help and that no sharp decrease in the flow of benefits would take place. The VA provides free help to any vet filing a benefit claim form, too.

The federal agency in Michigan has 29 claims counselors to assist vets; 22 are based in Detroit. The veterans groups have 62, with 37 based in Detroit, and 25 scattered across the state, O'Neill said. An additional 60 counselors work for county veterans services offices funded by county governments.

Salaries for the counselors and the operation of the 11 offices maintained by the veterans groups come from their state subsidies.

The veterans groups receiving state grants are: VFW, $641,300; American Legion, $583,400; Disabled American Veterans, $529,100; AMVETS, $336,200; Marine Corps League, $243,200; Paralyzed Veterans of America, $120,200; Military Order of the Purple Heart, $112,900; World War I Veterans of America, $51,000; Vietnam Veterans of America, $40,000; Jewish War Veterans, $30,000 and Polish Legion Veterans of America, $30,000.

Thirty-nine states find it more efficient to help veterans through state agencies. New York's agency has a budget equal to the grants Michigan gives its veterans groups, about $3 million. But the return is $2 billion in benefits. Florida and California report similar stories.

John Cummings, service director for the Marine Corps League, said the league would oppose creating a state agency in Michigan, a move lawmakers have discussed in the past.

"With a state agency, it would be more of a civil service attitude, more of a colder attitude. We try to go beyond that," he said.

Cummings and the directors of other veterans groups said the current system allows veterans to help veterans. Veterans go to great lengths to help other veterans file benefit claims. They visit homebound veterans, for instance.

"The VA does not do that," Cummings said.

Critics claim the veterans groups prevent changes that would better the system because they may lose members if they stop providing benefit help.

They also say the organizations have sufficient funds to support their own programs. The Detroit News examined IRS records for 11 veterans groups that receive subsidies from Michigan. Some groups may have funds to cover more of the expenses they incur helping their members file VA claims, the records show.

For example, the Michigan branch of the Disabled American Veterans publicly accounts for the money it receives from the state. But it does not make public the total amount the state organization, including branches, collects and spends. But the DAV parent organization, based in Cincinnati, in 1986 placed its national headquarters' net worth at $125.5 million. Of that, $107 million was invested in stocks and bonds. It reported receiving $39 million in contributions from the public and total revenues of $52.3 million. It spent $21.1 million on its programs.

These figures do not reflect the organization's entire net worth. Missing are expenses, fund-raising income and the worth of 2,800 state and local chapters — figures the national office does not report.

Some veterans organizations also report "excess" revenues at the end of the year.

IRS records show VFW headquarters in Kansas City, Mo., had $11.3 million left at the end of 1984. Yet the VFW's state chapters asked authorities in many states to subsidize their service programs for veterans. Michigan legislators gave the VFW $589,500 the same year.

The Detroit News sought similar reports on the financial status of the 11 state veterans chapters. The organizations declined to provide comprehensive audits for their statewide operations, however. They made available records only for the portion of their operations supported by the state grants.

State charities work without national office supervision

By John T. Wark
News Staff Writer

"Holy mackerel," said Muriel Parkhurst, national executive administrator of Veterans of World War I of the USA Inc. "I'm practically speechless."

During 12 years with the veterans group, she had never heard of the Department of Michigan Veterans of World War I of USA Inc.

Following an inquiry from The Detroit News, Parkhurst checked with a co-worker in the organization's Washington, D.C., office. But he had not heard of the group either, she said.

Was it or wasn't it part of the national organization?

It was, Parkhurst later determined.

But the confusion illustrates a problem some critics find with the VA benefit system: National veterans groups often do not know, or want to know, what state and local affiliates are doing.

The Michigan group received a $51,000 grant this year from the state and maintains an office in the McNamara Federal Building in Detroit.

Records filed with the Michigan Department of Military Affairs show the organization will spend $40,000 of the $51,000 on salaries for a director and assistant director and expenses for six unpaid field workers.

"She's probably not aware of what goes on in these organizations around the country," said Carl Pape, director of the World War I group's Michigan office when told of Parkhurst's surprise.

According to Pape's records, most of the claims handled by his office are related to death benefits. There were 99 such claims in 1985-86, compared to four new veterans pension claims and five new education claims.

Parkhurst said that while it was possible the Michigan group "falls under" her organization, it is "not really" a part of the national group.

"You can understand my amazement at hearing about this. We're running a deficit of between $52,000-to-$86,000-a-year and yet you're telling me we have a group in Michigan getting $50,000 a year from the state?"

Internal Revenue Service records filed by Parkhurst's office in 1985 show the national organization spent $83,434 that year on what it identified as programs for veterans.

The records show $144,823 was spent on such things as salaries for Parkhurst and on accountant, office rent for the organization's Washington, D.C. headquarters, travel, postage, telephones and "membership department expenses."

Detroit News 11/11/87

E VETERANS
ATERNITY
OND OF THREE PARTS

Watchdogs flunk some charities

5 do not meet standards of monitoring agencies

By John T. Wark
News Staff Writer

Some of the nation's largest veterans organizations ask the public for money but have not met standards set by charity watchdog groups, according to two organizations that monitor solicitations.

The guidelines are designed to let contributors know how much money is used for programs and how much covers a charity's administrative and fund-raising costs.

The standards are voluntary and failing to meet the guidelines does not mean wrongdoing.

But the groups that fall short of standards set by national charity-rating organizations are: AMVETS National Service Foundation, Disabled American Veterans, Paralyzed Veterans of America, the Blinded Veterans Association and Military Order of the Purple Heart. All are private, not-for-profit corporations that accept tax-deductible donations from the public.

Reports on the five have been compiled by the nation's two largest private charity rating agencies — the National Charities Information Bureau (NCIB) in New York City and the Council of Better Business Bureaus' (BBB) Philanthropic Advisory Service in Arlington, Va.

The agencies have evaluated six veterans groups within the past two years and — according to their latest data — five failed to meet all the standards set by one, or both, of the groups. A sixth, Veterans of Foreign Wars, did not re-

Veterans

Watchdog groups flunk several major charities

From page 1A

spond to BBB requests for financial records required for an evaluation, the bureau said.

Spokesmen for the veterans organizations said they are not required to report to either agency.

"We don't report as a group to the NCIB. But internally all of our chapters are required to submit audit reports to me," said Joseph Sternburg, chief financial officer for Paralyzed Veterans of America. "The NCIB is entitled to establish their own standards, and we could debate those standards all day."

Of the 40 charities currently evaluated by the NCIB, 3 failed one or more standards. Four of those were veterans organizations. Of the 300 charities evaluated by the BBB, 61 failed to meet its standards, including two veterans groups.

The not-for-profit veterans organizations were named for at least one of the following reasons:

- Not spending a sufficient portion of income on programs for veterans. It is recommended that nonprofit fund-raising groups spend between 50 and 60 percent of their funds on charitable programs.
- Sending unordered merchandise to the public when soliciting by mail.
- Not providing potential donors with specifics on how donations would be used.
- No public financial accountability.
- No consolidated financial reports.
- Providing financial audits for their national offices and headquarters only, and omitting expenses and revenues of thousands of state chapters, posts and units. The veterans groups say local chapters exist independent of the national organizations.

The rating agencies evaluate only fund-raising organizations about which they have had an inquiry. The agencies, for example, have not evaluated the American Legion or the Marine Corps League — two large veterans groups — since neither group has generated public inquiries, spokesmen for the NCIB and BBB said.

The two groups periodically compile and publish lists of charities they evaluate. The voluntary standards cover public accountability, use of funds, truth and accuracy and clarity of solicitations, fund-raising practices, and how the organization is governed. The evaluations are intended to provide the public with information that will promote wiser giving.

Spokesmen for the NCIB and the BBB, as well as other experts on charities said the public should routinely request detailed financial information from any person or organization seeking a donation.

Frank Driscoll, a senior analyst for the NCIB, said the information can also be of use to members of nonprofit organizations.

"Anyone who gives to, or belongs to such a group, should be concerned about how their money is spent," he said. "Any nonprofit charitable organization has an obligation to account for its funds."

Driscoll said the public should know which organizations, for example, spend 90 cents of every dollar on charitable programs and which spend only 30 cents. The theory is that most people contribute money where it will do the most good. And the publicity will encourage charities to keep expenses reasonable.

Friday: *State grants that go to Michigan veterans groups.*

How is money from poppy sales spent?

American Legion, VFW execs refuse to disclose their audits

By John T. Wark
News Staff Writer

The red paper poppies sold across America bring in millions of dollars annually for the Veterans of Foreign Wars and the American Legion.

But neither organization offers a consolidated accounting for the money raised, as recommended by private national charity watchdog groups.

Congress, which charters the organizations, requires them to file audited annual reports with Peter W. Rodino, D-New Jersey, as chairman of the Committee on the Judiciary, U.S. House of Representatives.

BUT A SPOKESMAN for Rodino's office said congressional rules allow only members of Congress to examine the documents, and then only in closed committee rooms.

Sources connected with the committee said, however, the audits are "paper audits, not field audits" that "only provide gross figures."

And, they said, the audits cover only the national headquarters, omitting finances for the nationwide network of state chapters, posts and units.

Many states require organizations doing fund-raising to fully account for what happens to their funds. Michigan's charitable solicitation law, however, exempts veterans groups.

REPRESENTATIVES for the VFW and the Legion declined requests from The Detroit News for audits showing how much money is raised through poppy sales and what happens to the money.

Herbert Irwin, the VFW's national business administrator, said that because VFW headquarters itself does not do the fund-raising, it isn't accountable for the money raised from the estimated 16 million poppies the VFW sells.

A former member of the VFW's national poppy committee, Wisconsin resident Victor Hinze, said that poppy sales raise almost $9 million a year for the organization.

The VFW headquarters arranges for veterans in Veterans Administration hospitals to make the poppies, which the national office then sells to its 9,500 posts around the country for a penny each — or about $160,000 — Irwin said.

BUT ONCE the poppies are given to the "autonomous and independent" posts, only the posts can account for the proceeds from their sale, he said. The posts do not report back on how much money they raise or how the money is spent.

"They don't have anything to do with our books, nor do we have anything to do with theirs," Irwin said.

The VFW's bylaws put restrictions on what the posts may do with the money, Irwin said. Poppy proceeds are "supposed to go to our veterans service fund to help needy vets," he said. "If posts do anything improper we can jerk their charter."

Irwin said he had no idea how much of the money went directly to disabled veterans. He said a portion of all proceeds, about 1 percent, goes to the VFW's National Home orphanage in Eaton Rapids (near Lansing).

ROBERT SPANOGLE, finance officer for the American Legion, said the Legion can account for poppies sold by between 50 to 60 percent of its posts. He declined to disclose that accounting.

Spanogle said of the money raised by Legion posts, "the money either goes to the VA hospitals, or a veteran will come into the posts in need and a post may decide to give him some.

"I have no handle on how much posts, on the average, give to the hospitals," he said.

When a post gives a contribution to a hospital, it is often in the form of gifts, such as stereos, televisions, games or equipment.

NATIONAL CONVENTION
VETERANS OF

ASSOCIATED PRESS

Relaxing in his office in Tawas City, Herbert Irwin, the VFW's national business administrator, said that VFW headquarters isn't accountable for the money raised from the estimated 16 million poppies sold by VFW posts across the nation.

EXHIBIT **D**

VICTOR ATIYEH
GOVERNOR

Department of Veterans' Affairs
VETERANS' SERVICES DIVISION
OREGON VETERANS' BUILDING, 700 SUMMER ST. NE., SUITE 150, SALEM, OREGON 97310-1270

July 9, 1986

Kathleen Anderson-Tucker
29368 SE Chase Road
Gresham, Oregon 97030

Your application for the Oregon Attorney Assistance Program has been denied.

ORS 406.410 authorizes attorney services for war veterans who are residents of Oregon. Your application was made on behalf of the veteran's children. Only applications submitted by the war veteran can be approved for the Oregon Attorney Assistance Program.

You should work closely with the Accredited Representative, Power-of-Attorney, who is helping the veteran's children with their cla

If you have any questions, please call me.

THOMAS A. WEISS
Counseling Supervisor for
Director, Department of Veterans' Affairs
1-800-692-9666

TAW:dmt

EXHIBIT **E**

Department of Veterans' Affairs

Oregon Veterans' Building, 700 Summer Street N.E., Salem, Oregon 97310-1201

February 26, 1985

Jeffrey R. Stanton
Regional Director
Veteran's Due Process
PO Box 8900-SP 294
Salem, OR 97303-0890

Dear Jeff:

In answer to your letter of February 10, 1986, I can offer the following information:

1. Office space cost for the Portland Claims Office in the Federal Building is computed to be $15,380.78 per year.
2. Charges for telephone service by the Portland Claims Office are $148.92 per month, or $1,787.04 annually.
3. The Veterans Administration does provide office furniture for the Portland Claims Office. Most of the furniture has been there at least 10 years, so a statement of value would be mere speculation.

The Veterans Administration provides:

3 steno desks (metal)
3 executive style desks (metal)
3 tables
2 typewriter stands
2 lateral file cabinets
1 bookcase
1 metal clothes closet

6 side chairs
2 reception chairs
6 desk chairs
5 partitions
1 credenza
1 small table

Sincerely,

Jon

JON A. MANGIS
Director

AUTHORIZED BY 38 U.S.C. 3402

CLM:JJ
0493

EXHIBIT **F**

THE WALL STREET JOURNAL.

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VOL. CXV NO. 9 ★ ★ ★ MONDAY, JULY 14, 1986 Federal Way, Washington ... 50 CEN

House Showdown Looms on Bill Letting Veterans Appeal Benefit Rulings in Court

By Eduardo Lachica

Staff Reporter of The Wall Street Journal

WASHINGTON – Rep. G.V. "Sonny" Montgomery (D., Miss.), the conservative chairman of the House Veterans Affairs Committee, and liberal Rep. Don Edwards (D., Calif.), the committee's ranking Democrat, are such good friends that they play tennis twice a week at the Army-Navy Club.

But in the committee these days they're implacable foes. Mr. Edwards is pushing the panel to strike down a 53-year-old law preventing veterans from going to court to appeal Veterans Administration rulings on benefit claims. "Other Americans can have their day in court," argues Rep. Edwards, who has made his mark as a civil-rights champion. "Why not veterans who fought to protect that system?"

G.V. Montgomery

But Chairman Montgomery is just as determined to preserve the current system, in which veterans claims are adjudicated on a non-adversarial basis with the help of service organizations such as the American Legion and the Disabled American Veterans. "Why fix something that isn't broken?" he asks.

The stakes are considerable. Much of the $14 billion annual VA budget – the third largest federal-agency budget, behind only Defense and Health and Human Services – is handed out as disability benefits or pension payments to nearly three million veterans. It also pits the older-line veterans outfits against the younger Vietnam veterans groups.

Showdown Looms This Week

A committee showdown looms this week on Rep. Edwards's bill to change the law. Winning the vote in committee could be the key battle; Mr. Edwards has lined up 223 co-sponsors and predicts that the bill will "sail through the floor" if it's reported out of committee. And the Senate passed an equivalent bill last year.

Among the bill's strongest supporters are Vietnam War veterans seeking federal compensation for the effects of exposure to the herbicide Agent Orange. They won $180 million in settlement of a class-action suit against U.S. manufacturers of the herbicide three years ago. But the 1933 law still bars them from bringing the VA to court for denying most of their claims for disability benefits. The Vietnam Veterans of America is among those backing the new bill.

Others rallying behind Mr. Edwards's effort include victims of radiation illness and of delayed stress, a psychiatric condition that lingers years after combat. The VA now recognizes delayed stress as a service-related disability, but the awards granted by its regional offices range from fair to scant.

Many lawyers are also happy with the bill's intent to update a hoary law that puts a $10 limit on attorney's fees for representing veterans. "This law has gone uncorrected since the Civil War," says Illinois Attorney General Neil Hartigan. "The legislators who approved it could buy shirts for less than $2 and a cup of coffee for a few cents."

Montgomery Has Allies

Robert Muller, president of the Vietnam Veterans of America, sees the issue as one of basic fairness. "The VA sues tens of thousands of veterans for money it believes the veterans owe, but the veterans can't sue back," he told the committee. The Edwards bill would allow the courts to review only "arbitrary," "capricious" or legally questionable VA rulings.

But Mr. Montgomery isn't without potent allies in his effort to preserve the present system. Chief among them are the VA itself, which says it fears the costs of a flood of court challenges, and such traditional veterans organizations as the American Legion and the Disabled American Veterans. Under the current setup, these organizations get free space in the VA's 58 regional offices to provide paralegal aid for veterans bringing claims before a VA rating board.

The veterans organizations can legally claim such privileges because of the public-service nature of their work. They help veterans process their claims with no compensation other than regular membership dues.

Defenders insist the current system, while not perfect, works well for most veterans. Of the more than four million VA actions on claims every year, only about 50,000 are brought to the Board of Veterans Appeals, the highest appellate level for such claims. "That indicates a general satisfaction with the system," contends Donald Ivers, the VA's general counsel.

Vote Expected Wednesday

"From the start, the VA has been geared to helping the veteran," says Rep. Montgomery. "Bring in lawyers and an adversarial system, and you change all that." He worries that veterans' appeals would put a further burden on an already overworked court system. Adds Jacklyn Lucas, an ex-Marine who won the Congressional Medal of Honor for throwing his body over a live grenade to shield his buddies at Iwo Jima: "If there are any benefits, they should go to the veterans, not the lawyers."

Don Edwards

A close vote in the committee is expected, probably next Wednesday. Although 15 of the panel's 33 members are co-sponsoring Rep. Edwards's bill, the California Democrat doesn't underestimate the clout of the opposition.

He even thinks his friend, Sonny Montgomery, stacked recent hearings on the bill in favor of opponents. Further, he charges the VA virtually "blackmailed" major veterans organizations into opposing the measure. A letter from a VA official warned these organizations they could lose their free space and telephone lines at VA regional offices if this proposal became law.

EXHIBIT G

Office of Congressional
and Intergovernmental
Affairs

Washington DC 20420

Veterans
Administration

In Reply Refer To:

June 5, 1986

Mr. Jon A. Mangis
Director
Department of Veterans Affairs
General Services Building
700 Summer Street, NE
Suite 150
Salem, Oregon 97310-1270

Dear Mr. Mangis:

In accordance with our desire to maintain close cooperation and liaison with state offices and private agencies serving our nation's veteran community, I am enclosing copies of topical discussion papers recently released by the Veterans Administration which I think will be of immediate interest to you.

Each of these papers address important issues concerning the continued delivery of VA health care, benefits and other services to veterans in the future. The immediate items of discussion and interest are:

1. Consolidated Omnibus Budget Reconciliation Act of 1985 (Public Law 99-272):
   A. Changes in VA Health Care Eligibility.
   B. Recovery of Cost of VA Health Care.
2. Judicial Review: An Overview of VA's Position.
3. H.R. 585 (VA Adjudication Procedure and Judicial Review Act): Impact on VA Adjudication Procedures.

As you know, these concerns have all been high-priority issues among the veteran community for many months. We have a continuing obligation to veterans and veteran service officers to insure that our views, guidelines and methods of operation are clearly understood and widely disseminated in as timely a manner as possible. I am sure you will agree that these point papers adequately serve this purpose.

"America is #1—Thanks to our Veterans"

Page 2.

I would very much like to receive your views on these issues, particularly regarding your ideas on the VA positions as enumerated in these enclosures. Your written comments would be greatly appreciated, or you can contact me or Larry De Meo of my staff at (202) 389-5554. We look forward to hearing from you.

Sincerely,

GAIL A. GOMPF
Director
Intergovernmental Affairs

Attachment

- H.R. 585 would codify, with some changes, current adjudication procedures, subject VA rulemaking to provisions of the Administrative Procedure Act, permit judicial review of individual benefit determinations, and revise the existing $10 limit on attorney fees. The most significant aspect of the bill is the judicial review provision.

- VA is strongly opposed to this aspect of the bill because it would provide an illusory benefit, at best, at the risk of fundamentally changing the pro-veteran operation of our current system which everyone agrees is a good one.

- Veterans would derive negligible tangible benefit from access to the courts, which would review their claims only after they had been denied on two separate administrative levels:

--The existing informal, nonadversary adjudication system is fair, and considers each veteran's claim in its most favorable light. Accordingly, it would be unlikely for a court to legitimately conclude that a case had been "arbitrarily and capriciously" decided by the VA.

* The present system would inevitably be changed for the worse by the availability of judicial review:

--The entire adjudication process would become more rigid, formal, and time-consuming, and would assume an adversary character because judicial scrutiny of the administrative record would compel the Agency to document every factor and consideration that led to the denial of a claim, thereby creating a "complete" record for review.

--Judicial review would impose additional financial burdens on claimants, and would delay the processing of all claims.

--The bill would encourage more representation by private attorneys, and eventually, claimants may feel compelled to retain counsel even in simple cases.

--Reliance on the 94 Federal District Courts would result in inconsistent decisions thereby creating the possibility that veterans' entitlement to benefits may vary depending on the geographic area in which a claim is adjudicated.

OVERVIEW OF VA's POSITION ON JUDICIAL REVIEW

The Veterans Administration believes that veterans deserve an efficient, just, and compassionate system of dispute resolution. We understand the philosophic appeal of judicial review, which would grant veterans their "day in court." However, H.R. 585, 99th Congress, would sour the already good system to the detriment of all veterans.

Veterans would derive negligible tangible benefit from access to the courts. Under the existing adjudication system, claims for VA benefits can be reviewed, perhaps on multiple occasions, on two separate administrative levels. Claims receive thorough and careful consideration, and all reasonable doubt is resolved in favor of the claimant. Furthermore, internal quality control programs assure that VA decisionmaking is kept to a high standard of accuracy. We are confident that only in rare instances would a court find a VA decision to be arbitrary and capricious.

Under current practice, VA assists a claimant in developing evidence favorable to establishing eligibility. If the evidence adduced on the claimant's behalf is sufficient to establish entitlement, the claim is allowed. If not, the claimant is advised that available evidence is insufficient

to establish eligibility in the expert opinion of the reviewing panel, which, with respect to disability claims, includes a medical doctor. Imposition of judicial review poses a real risk that this current focus of our administrative process--assisting claimants establish benefit entitlement--will shift to insuring that VA denials withstand judicial scrutiny.

The bill's supporters have the laudable intention of preserving intact this informal and cooperative system, and simply adding another available remedy. What we believe they have not foreseen, and what is central to our opposition to H.R. 585, is that the current system would inevitably be changed for the worse by the mere availability of judicial review in the U.S. District Courts.

Enactment of judicial review would interject an adversary relationship into what has been a cooperative process. As a matter of principle, VA should never be placed in an adversary posture, much less become an opposing litigant, with respect to claimants. The prospect of court scrutiny and repeated challenges to our pro-veteran process would necessarily result in more rigid and formal procedures.

3.

VA would be thrust into the unaccustomed adversarial role of developing evidence to refute a claimant's contentions in order to assure that the record supports denial of the claim to the satisfaction of a reviewing judge. The Agency would have to document every factor and consideration that led to denial of a claim, that is, "build the record." Each procedural step would have to be recorded, including minor ministerial actions. The professional knowledge of a BVA or Rating Board physician member would have to be set forth in the record in detail and bolstered by additional evidence, such as scientific treatises or journal articles, for the benefit of judges untrained in the medical profession.

This adversarial posture would, conceivably, be most evident in cases in which eligibility turns upon the credibility of a witness, perhaps the claimant himself or herself. If, for whatever reason, VA found the witness' testimony less than persuasive, it could be forced to examine or cross-examine the witness in a manner designed to expose the basis for VA's disbelief. Direct, probing questioning by the rating board or BVA members would be needed to create a "complete" record. This examination, with a view toward withstanding judicial scrutiny, will at a minimum place us in an antagonistic role that renders the process more acrimonious. The assistive relationship with veterans we cur-

rently enjoy would be undermined, and perhaps with it a sense of our mission to help them. In a system so different, no one can forecast with confidence that the attitudes of VA adjudicators, no matter how well-intentioned or trained, will not change as well.

Furthermore, administrative flexibility could be lost. At present, for example, the Agency liberally applies requirements of timeliness, particularity in the filing of appeals, and the proffering of "new and material" evidence to reopen a case. This means the VA often expends extra effort in a host of cases that, technically, do not comply with the rules for obtaining review. With the likely change in our relationship with the veteran after enactment of the bill, increased pressure to handle cases as expeditiously as possible, concern with committing reversible errors in certifying appeals, and the participation of more attorneys, who should be held to a high standard for compliance with such "jurisdictional" rules, the relaxed approach may be expected to change.

The length and formality of personal hearings would increase as more attorneys get involved and as VA is forced to build the record. Hearings may become protracted by extensive briefing, subpoena of treating or consulting physicians, introduction of

circumstantial testimony by friends or family members, and more intensive direct- and cross-examination of witnesses.

Judicial review would also delay the processing of all claims. The perceived need to build the record will require VA to secure additional documentary evidence, time-consuming examinations, and social surveys. The prospect of judicial second-guessing may increase the remanding of cases by the BVA in cases involving only "technical" or otherwise harmless administrative errors. Such delay could reduce the value of awards (future dollars) for successful claimants, and foster demoralization and the perception that the system is unfair.

Moreover, many special considerations currently extended to veterans service organizations may have to be curtailed. The providing of VA space and facilities, informal access to adjudicatory personnel, etc., could be affected by judicial oversight and increased representation by private attorneys.

The uniformity in decisionmaking now provided by relying on a centralized, collegial body like BVA can also be expected to suffer. Vesting review authority in the 94 district courts will result in inconsistent decisions mandated by application of different eligibility and adjudication standards likely to be

developed in the courts. In our view, a veteran's entitlement to benefits is not a matter that varies with geography, and a veteran should not be subjected to a system in which the resolution of a claim may differ depending upon the judicial district in which the veteran resides.

Finally, it should be noted that the participation of attorneys would increase the costs to claimants. The primary purpose of the present limitation on fees is, of course, to preserve a claimant's award of benefits to the maximum extent possible. With modification of the attorney fee provision, attorney participation may be expected to increase, and those who retain counsel will obviously bear a greater expense. For example, liberalization of attorney fee awards in Social Security cases caused lawyer representation to jump from 36.8% in 1977 to 64.2% in 1983.

We are also concerned that such representation would become the norm, regardless of whether a claimant actually needs a lawyer. As the U.S. Supreme Court observed in a recent challenge to the attorney fee limitation:

> It is scarcely open to doubt that if claimants were permitted to retain compensated attorneys the day might come when it could be said that an attorney might indeed be necessary to present a claim properly in a system rendered more adversary and more complex by the very presence of lawyer representation. It is only a small step beyond that to the situation in which the claimant who has a factually simple and obviously deserving claim may nonetheless feel impelled to retain an attorney simply because so many other claimants retain attorneys.

Walters v. National Association of Radiation Survivors, _ U.S. _, 105 S. Ct. 3180, 3192 (1985).

In conclusion, we believe the imposition of judicial review might benefit a few individuals, but it would work to the detriment of the great majority of claimants as it formalizes and delays the processing of claims, and alters the cooperative relationship between veterans and the Agency. Veterans now have a fair and impartial forum. Our procedures afford a full opportunity to present all evidence and have it carefully considered. So uniquely beneficent a system should not be jeopardized for the dubious end of guaranteeing a few unsuccessful claimants the opportunity of having their claims again considered -- and probably denied -- in a court of law.

EXHIBIT **H**

COMMITTEE ON
JUDICIARY

CHAIRMAN
SUBCOMMITTEE ON
[illegible]
[illegible]

COMMITTEE ON
VETERANS AFFAIRS

Congress of the United States
House of Representatives
Washington, DC 20515

[illegible]
[illegible]
[illegible]

July 1, 1986

Letter to the Editor
The Washington Post
1150 15th Street, NW
Washington, DC 20071

Dear Editor:

Some opponents have taken issue with your support of H.R. 585, a bill to authorize court review of VA decisions and to allow veterans the right to counsel of their choice. As sponsors of the bill, permit us to address just a couple of points.

It is laudable that "as a matter of principle, the VA doesn't view itself as a prospective litigant with the veteran." Unfortunately, that statement doesn't square with reality. In the past four years alone, the VA has filed suit against more than 140,000 veterans, for alleged benefit overpayments that average $570.

While litigating against these veterans, the VA says that the court can't even listen to the veteran's defense, arguing that current law precludes judicial review of any decision of law, regulation, or fact made by the VA.

Further, the VA's commitment to an "informal and cooperative system" must be called into question when the VA tells veterans' organizations that passage of judicial review legislation will result in the loss of the free office space, furniture, and telephone service presently provided to these groups in VA regional offices.

On another point, it simply is not the case that the federal courts have already "overwhelmingly decided that judicial review of the VA is permissible". If it were, we would be codifying case law and there should be no opposition to that.

In reality, most courts maintain the interpretation that the current law means what it says -- the courthouse door is closed to veterans unless the VA violates the Constitution.

In fact, Judge Scalia, recently nominated to the Supreme Court, made very clear in the D.C. Circuit Court of Appeals' decision last year that the current bar to court review means what it says and prevents the judiciary from deciding whether the VA has violated a statute or even its own regulations.

The opponents of H.R. 585 point to the experience of social security recipients as a failure of judicial review. But, in reality, this experience is proof of the case for judicial review. Just as the founders of our country intended, this system of checks and balances works to protect many thousands of ordinary citizens from the excesses of the executive branch of government.

Witness in Illinois alone the 30,000 disabled citizens who had their social security disability benefits reinstated after the courts reviewed the government action that had wrongfully deprived these citizens of their rightful entitlement.

Legislation similar to H.R. 585 has already passed the Senate, as it has under both Democratic and Republican control in the last three Congresses. On July 16, the Members of the House Veterans Affairs Committee will cast their votes.

With over 228 cosponsors of H.R. 585 in the House of Representatives, we hope this will be the year that the Committee acts to rectify the injustices imposed upon veterans by laws which date back over 120 years and which have long outlived the times for which they were designed.

Surely veterans, who fought to safeguard our constitutional freedoms, should be allowed their day in court and the right to hire counsel if they so choose. Surely veterans deserve the equal justice under law provided welfare recipients, undocumented non-citizen workers, and federal prisoners when they have a grievance against the government.

It really is true that no agency should be the judge of its own actions. It really is time to give veterans an even break, a fair deal, and a fighting chance.

Sincerely,

Don Edwards
DON EDWARDS
Ranking Majority Member
Veterans Affairs Committee

Lane Evans
LANE EVANS
Chair, Vietnam-Era Veterans
in Congress

Tom Daschle
THOMAS A. DASCHLE, Chairman
Subcommittee on Education, Training, and Employment
Veterans Affairs Committee

Bob Edgar
BOB EDGAR, Chairman
Subcommittee on Hospitals and Health Care, Veterans Affairs Committee

STATEMENT OF DONALD L. IVERS
GENERAL COUNSEL
VETERANS ADMINISTRATION
BEFORE THE
SENATE COMMITTEE ON VETERANS' AFFAIRS
APRIL 28, 1988

Mr. Chairman and Members of the Committee:

I am pleased to be here today to present the views of the Veterans Administration on S. 11, 100th Congress, entitled the "Veterans' Administration Adjudication Procedure and Judicial Review Act," and regarding Senator Murkowski's bill, S. 2292.

S. 11 contains four substantive titles: First, the measure would codify, with some changes, the procedures now used by the Agency in making benefit determinations. Second, it would statutorily subject VA rulemaking to the provisions of the Administrative Procedure Act, 5 U.S.C. § 553. Third, it would repeal section 211(a) of title 38, United States Code, to authorize judicial review of individual VA benefit decisions in Federal courts. Finally, the proposal would substantially revise the current $10 statutory limit on the fee an attorney may receive from a claimant for representation in a claim matter.

The provision of overriding significance to veterans and to this Agency is title III, which would involve Federal courts in determinations concerning VA benefits. The remaining aspects of the bill essentially facilitate judicial review. For the reasons that follow, the VA is strongly opposed to enactment of S. 11.

Mr. Chairman, in past reports to this Committee we have identified many technical problems related to similar legislation, and I refer the Committee to our testimony on H.R. 585, 99th Congress, as well as our report on S. 367, 99th Congress. In the short time allotted to us this morning, I will forego discussion of the details of the bill and, instead, elaborate generally on the bases for the Agency's opposition to judicial review under S. 11.

At the outset, I wish to put to rest a popular myth that the statute barring judicial review denies veterans their right to due process of law. That simply is not the case. The courts have consistently held that constitutional guarantees of due process do not require a judicial remedy for contesting all administrative actions.1/ In fact, there are approximately 80 Federal statutes prohibiting judicial review in other spheres of government activity. The Federal Employees

Compensation Act, 5 U.S.C. § 8128(b), for example, provides that a government employee, including members of this Committee and staff, claiming disability compensation for work-related injury may not seek judicial review of the Secretary of Labor's denial of the claim. Over 156,000 such claims were filed last year. Thus, there is nothing unique or unfair about an exclusively administrative process for rendering VA benefit decisions.

It is noteworthy that section 211(a) does not infringe upon the right of a veteran to go to court to challenge the constitutionality of VA statutes, thereby preserving the balance of power between the branches of government.

Moreover, the VA adjudication system contains essential procedural protections to ensure fairness. Claims for VA benefits can be reviewed, often on multiple occasions, on two separate administrative levels. The Agency assists in the procurement of evidence to support a claim, and claimants may take advantage of the skilled advocates provided free of charge by the veterans service organizations. Claimants are advised of the law and regulations pertinent to their claims and may request oral hearings to present their arguments personally to the adjudicators. In addition, internal quality control programs assure that VA decisionmaking is kept to a high standard of accuracy. We are unaware of any administrative process operated by any other Federal agency that is more pro-claimant, simpler to use, or more equitable, regardless of the presence of judicial review.

Generally speaking, veterans have a special advantage over claimants for other types of gratuitous benefits. Veterans are represented institutionally by well-organized veterans groups that not only scrutinize the operation of the Agency, but also actively represent the views of veterans before Congress and the Executive Branch. Moreover, congressional committees continuously provide aggressive oversight of the VA. They focus public attention on trends, policies, and programs, and hold the Agency accountable. Thus, veterans who utilize the system enjoy special access and input into the system that provides the benefits they justly deserve.

The VA's primary objections to enactment of S. 11 are that judicial review will, over time, cause the entire administrative system to become more adversarial and will cause the processing of all claims, whether allowance or denial, to become burdensome and protracted. Judicial scrutiny of the record prepared administratively, particularly with increased involvement of attorneys whose training and experience are geared to adversarial proceedings, will alter the claim process in a fundamental and pervasive manner.

For instance, VA would be thrust into the unaccustomed adversarial role of developing evidence to refute a claimant's contentions in order to assure that the record supports denial of an unmeritorious claim to the satisfaction of a reviewing judge. The Agency would have to document every factor and consideration that led to denial of a claim, that is, "build the record." Each procedural step would have to be recorded, including minor ministerial actions. Unable to rely on judicial deference to the medical judgment of its adjudicators, who include doctors of medicine, VA would have to develop and introduce additional record evidence, such as consultative opinions and scientific treatises or journal articles contrary to the claimant's theory, for the benefit of judges untrained in the medical profession.

This adversarial posture would, conceivably, be most evident in cases in which eligibility turns upon the credibility of a witness, perhaps the claimant himself or herself. If, for whatever reason, VA found the witness' testimony less than persuasive, it could be forced to examine the witness in a manner designed to expose the basis for VA's disbelief. Direct, probing questioning by the rating board or BVA members would be needed to create a record to support a denial. The examination, with a view toward withstanding judicial scrutiny, will, at a minimum, place us in an antagonistic role that renders the process more acrimonious. Further, the VA will have to make thorough, explicit findings on the credibility of witnesses and cogency of self-serving statements. Overall, the assistive relationship with veterans that we currently enjoy would be undermined.

We are also concerned that S. 11 would increase participation in the administrative process by private attorneys. It may be anticipated that they will become involved at the earliest stages of preparing and presenting claims for benefits. Moreover, section 108 of S. 11 seems to presuppose active involvement of attorneys in the administrative stages, by calling for the submission of briefs, service of interrogatories, etc. This may also require the early involvement in the adjudication process of attorneys on behalf of the VA, an entirely new and, we feel, undesirable element to be added to the VA benefit claim process.

The Supreme Court in the case of Walters v. National Association of Radiation Survivors, 105 S. Ct. 3180, 3191-3192 (1985), observed that the introduction of attorneys inevitably gives administrative proceedings a more adversary character. In rejecting a constitutional challenge to the current attorney-fee limitation, the Court concluded:

> Knowledgeable and thoughtful observers have made the same point in other language:
>
> > "To be sure, counsel can often perform useful functions even in welfare cases or other instances of mass justice; they may bring out facts ignored by or unknown to the authorities or help to work out satisfactory compromises. But this is only one side of the coin. Under our adversary system the role of counsel is not to make sure the truth is ascertained but to advance his client's cause by any ethical means within the limits of professional propriety. Causing delay and sowing confusion not only are his right but may be his duty. The appearance of counsel for the citizen is likely to lead the government to provide one -- or at least to cause the government's representative to act like one. The result may be to turn what

> might have been a short conference leading to an amicable result into a protracted controversy." Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267, 1287-1290 (1975).

Furthermore, judicial review may result in the loss of a certain amount of administrative flexibility in the review of claims. For example, the Agency liberally applies standards of particularity in the filing of appeals and the proferring of "new and material" evidence to reopen a case. This means the VA often expends extra effort in a host of cases that, technically, might be viewed as not complying with the rules for obtaining review. With the likely change in our relationship with the veteran following enactment of the bill, increased pressure to handle cases as expeditiously as possible, and the participation of attorneys, who should be held to a higher standard for compliance with such "jurisdictional" rules, the relaxed approach may be expected to change.

In addition, judicial review will likely require the VA to alter procedural and organizational aspects of the decision process. The need to build the record will require VA to secure additional documentary evidence, time-consuming clinical examinations and field examinations, and, in some cases, compel claimants' or other witnesses' attendance at hearings deemed necessary by the Agency. Some courts have been hostile to adjudicators who take administrative notice of facts based upon their own experience and training when rendering a decision. At the very least, then, the VA will also have to put on the record the testimony of medical experts, no matter how mundane. This will protract proceedings and increase costs. Ultimately, the Agency may be forced to conclude the presence of medical doctors on its adjudication panels is unnecessary, if not antithetical to the notion that deciding officials may not rely on their own knowledge and expertise.2/

The use of interrogatories will also protract the claim process. It is almost certain that claimants will serve interrogatories on a host of individuals who are believed to have knowledge pertaining to a claim, including military personnel, VA officials, private citizens, physicians, independent medical experts, adjudicators, or service organization members. The process of answering interrogatories, of course, can be burdensome and time-consuming, and may cause some recipients to seek compensated counsel for advice. Subjecting the pool of independent medical experts to interrogatories may also strain that valuable VA resource. Moreover, service of interrogatories upon VA or fee-basis physicians will require them to interrupt their professional services. Similarly, service of interrogatories upon VA adjudicatory employees will take them away from their claim-processing duties.

In addition to the detrimental effect the bill will have on the claim process and VA's relationship with veterans, we are greatly concerned with the forum given responsibility for judicial review under S. 11. In our view, the U.S. district courts are an inappropriate and disadvantageous venue for appeals of VA benefit decisions.

Vesting authority in the 575 judges of the 94 Federal district courts will result in inconsistent case law and geographically-based decisions, thereby causing an individual's entitlement to benefits to be governed, at least in part, by where the claimant resides. As now, courts will differ on procedural rules, evidentiary requirements, and interpretation of substantive law. Lost will be the constancy fostered by having final authority vested in a single, collegial administrative review board with uniform procedural rules, guided by a consistent interpretation of substantive law.

The increase in the caseload of the district courts brought about by the enactment of judicial review would not only threaten the quality and timeliness of decisions, but also encourage the use of summary procedures to lighten the burden. Judicial rules of self-restraint, e.g., waiver, laches, exhaustion, or standing, may become rules of self-preservation.3/ In our view, the resultant product would not always be the "day in court" promised by the proponents of this legislation. A secondary effect may be a need to expand the courts in areas where caseloads increase dramatically.

Finally, a consequence of the participation of compensated attorneys under S. 11 will be an increase in costs for VA claimants. The primary purpose of the present attorney-fee limitation is, of course, to preserve a claimant's award of benefits to the greatest extent possible. VA's relatively simple, nonadversarial procedures as well as the availability of free expert representation from the veterans service organizations obviate the need for legal counsel.

With increased attorney participation under the bill, however, those who retain counsel will obviously bear greater expense, and those who do not will feel the effects of the burdens and delays brought about by attorney participation. Moreover, we believe that such representation would eventually become the norm, regardless of whether a claimant actually needs a lawyer. As the Supreme Court has observed in regard to increased attorney participation:

> It is scarcely open to doubt that if claimants were permitted to retain compensated attorneys the day might come when it could be said that an attorney might indeed be necessary to present a claim properly in a system rendered more adversary and more complex by the very presence of lawyer representation. It is only a small step beyond that to the situation in which the claimant who has a factually simple and obviously deserving claim may nonetheless feel impelled to retain an attorney simply because so many other claimants retain attorneys.

Walters v. National Association of Radiation Survivors, 105 S. Ct. 3180, 3192 (1985).

In conclusion, we are concerned that S. 11 would work to the great detriment of the vast majority of veterans who seek benefits from the VA as it formalizes and delays the processing of claims, and alters the cooperative relationship between claimants and the Agency. The bill is particularly inappropriate at this time when thoughtful, conscientious observers are calling for alternatives to litigation in the district courts and advocating more reliance on nonlawyer representation in claims for Government benefits.4/ It is important to bear in mind that the VA is a "mass-justice" agency, processing approximately 5 million claims annually. While judicial review may be a compelling notion when parochially thinking of an individual case, the magnitude of the anticipated caseload and impact on the handling of all the millions of claims require a more thoughtful approach to this issue.

Furthermore, judicial review of VA benefit decisions is a veterans issue. Yet, the issue of judicial review is being championed by small groups representing a miniscule segment of the veteran population, a few attorneys, and a corps of editorial writers. The vast majority of veterans are generally satisfied that they have a fair and impartial forum in the present system. What is more, the present system, while imperfect, is informal and assistive. It works for veterans, it works with veterans, and it is monitored by veterans. So uniquely beneficent a system should not be jeopardized for the philosophical end of guaranteeing a few unsuccessful claimants the opportunity of having their claims again considered -- and probably denied -- in a court of law.

You have specifically asked us to consider the merits of providing direct appeal of final VA decisions to the U.S. circuit courts of appeals. In our view, such a plan would provide the inherent advantage of collegial decisionmaking and the greater degree of consistency in decisions rendered by the courts of appeals. In addition, the panels of the courts of appeals have more familiarity with record-review of administrative actions, although their experience is most often with administrative records heavily influenced by preliminary review in the district courts.

The VA's objections to judicial review under S. 11, however, would continue to apply if the bill were amended to merely substitute the courts of appeals for the district courts. The prospect of court scrutiny and increased participation by attorneys would likewise make the adjudication system more adversarial, formal, and time-consuming. It, too, would impose additional, unnecessary costs upon claimants, the VA, and the courts. In addition, the demands of the caseload would further tax the resources of the courts and, perhaps, affect the collegial nature of the courts.

To the extent such a proposal is being considered, we would observe that existing law provides discretionary review authority in the courts of appeals in some cases, e.g., review of interlocutory orders under 28 U.S.C. § 1292(b) or decisions of the Merit Systems Protection Board under 5 U.S.C. § 7703(d). Given the potentially staggering number of appeals of VA benefit decisions, it may be preferable to similarly provide for discretionary, rather than mandatory, review limited to cases involving issues of law or policy having broad implications.

Mr. Chairman, we have also given thought to S. 2292, the "Veterans' Judicial Review Act," which was introduced last week by ranking minority member Murkowski. In his remarks upon introducing the bill, Senator Murkowski emphasized that veterans deserve a quick, convenient and responsive appellate process. Although we of course agree, we must oppose S. 2292 in its current form because of its serious shortcomings.

Under section 5 of the bill, for example, the BVA would no longer be bound by VA regulations, instructions of the Administrator, or precedent opinions of the General Counsel. Hence, the BVA would not be bound by essential regulations such as the Schedule for Rating Disabilities, doctrine of reasonable doubt, or even the Agency's liberal rules of practice and procedure. While there may be some sentiment for rendering the BVA more independent, the complete abrogation of VA regulations in the context of the Board goes too far and could lead to confusion, if not chaos.

The provision would also undermine the crucial role of regulations and General Counsel opinions in clarifying the law and maintaining consistency in the adjudication of claims. Without the binding effect of regulations and General Counsel opinions, the law applied to claims may vary depending upon the stage of adjudication; that is, rating boards may apply different interpretations of VA statutes than the BVA. In addition, the interpretations of law may differ significantly even among the 21 sections of the Board. One of the primary purposes of regulations and General Counsel opinions is to foster a constancy in the Agency's interpretations of the law so that veteran claimants are treated equally. Where disagreements with these interpretations arise, section 223 would provide for an appropriate, judicial remedy.

Moreover, the inference raised by section 5 and fostered by the more vocal advocates of judicial review that the General Counsel, a political appointee, would render legal opinions on benefit claims issues based on political and budgetary motivation, rather than sound legal reasoning, is without merit.

For these reasons, the current interpretative primacy of regulations and General Counsel opinions at the administrative stages must be maintained. Accordingly, if the Board, as we believe, should be bound by VA regulations, it follows that they should not be permitted to invalidate those regulations.

We also believe that proposed section 4010, which would grant claimants a right of review on top of that afforded by proposed section 223, is both unnecessary and undesirable. The judicial review of Agency regulations provided by proposed section 4010 essentially duplicates the remedy provided by proposed section 223. Moreover, judicial review under the latter section would be divisive and in some cases pit the Administrator against the veteran.

To facilitate review of regulations under proposed section 4010, it would be necessary for the Administrator to be represented by counsel before the BVA to properly develop and present the Agency's interpretation of regulations. This would place the Administrator in a directly adversarial role vis-a-vis veterans, a situation that should never be permitted. We anticipate that the Agency, as rulemaker, would have to brief and argue the broad policies, program concerns, and administrative histories underlying challenged regulations for the BVA's benefit as well as to establish a record for judicial review purposes.

We are also troubled by the attorney-fee provisions of the bill. It is important to note that S. 2292 would authorize attorney fees in excess of $10 for any challenge to the validity of a regulation under proposed section 4010, regardless of the merits of the challenge or the ultimate disposition. We believe that this economic incentive may encourage attorneys to make regulation challenges as a matter of course, regardless of the nature of the veterans' claims.

Proposed section 4010 also contains several ambiguities that may inadvertently broaden the scope of judicial review beyond the narrow bounds intended by the drafters of the bill. The definition of "regulation" in proposed section 4010(b)(8), for example, goes beyond the traditional concept of formal rules adopted by notice-and-comment rulemaking and may conceivably include manual provisions, circulars or policy statements issued by departments of the VA, but which do not have the force of law.

In addition, we foresee that_veterans may use proposed section 4010(b) to seek judicial review of the validity of VA regulations as applied by the Agency to their particular circumstances. Such challenges would put extensive factual and administrative records before the courts. This will enable the courts to more easily interpose themselves in fact-finding and individual benefit determinations.

Judicial review of Agency regulations under the bill and the provisions respecting the independence of the BVA will also raise important questions of deference. In challenges brought under proposed section 4010, for example, there is no guidance as to the weight to be given by the BVA to statutory and regulatory interpretations of the VA. The issue will be even more problemmatical in appeals from the BVA to the courts of appeals, wherein the courts will have to resolve the question of deference between the interpretation of the rulemaker (VA) on the one hand or the judgment of the independent arbiter (PVA) on the other. In our view, the bill should explicitly state that the VA's interpretation of its statutory authority and regulations is to be given conclusive weight unless clearly shown to be arbitrary, capricious, an abuse of discretion, or contrary to law.

Finally, the provisions respecting appointment, tenure, and compensation of BVA officers and members would be difficult to phase-in and manage. For example, it is not clear how current members would be affected and, if all new appointments would be required, how the Board should proceed in the interim. Likewise, the 15-year terms of BVA officers and members, without specific authority for reappointment or removal for cause or disability, could complicate recruitment and employment of qualified personnel. Even more important, the 15-year limitation could operate to undermine their independence. In addition, we are concerned that the preclusion of bonuses as a managerial prerogative may ultimately have an adverse impact on the timely handling of appeals.

For the foregoing reasons, the VA opposes enactment of the bill.

FOOTNOTES

1/ *See* *Lynch v. United States*, 292 U.S. 571 (1934); *Tutun v. United States*, 270 U.S. 568 (1926); *Kline v. Burke Constr. Co.*, 260 U.S. 226 (1922); *Milliken v. Gleason*, 332 F.2d 122 (1st Cir. 1964), *cert. denied*, 379 U.S. 1002 (1965).

2/ *See generally* *Stewart v. Harris*, 508 F. Supp. 345 (D. N.J. 1981); *Chism v. Sec. of HEW*, 457 F. Supp. 547 (C.D. Cal. 1978); *Lightfoot v. Mathews*, 430 F. Supp. 620 (N.D. Cal. 1977).

3/ *See generally* *H.R. 585 and Other Bills Relating to Judicial Review of Veterans' Claims*: *Hearings on H.R. 585 before the House Committee on Veterans' Affairs*, 99th Cong., 2d Sess. 179-184 (1986) (Statement of Keith A. Rosenberg, Esq.).

4/ *See* 1986 A.C.U.S. Recommendation 86-3; Burger, *Isn't There a Better Way?*, 68 A. B. A. J. 274 (March 1982); Wright, *Judicial Review and the Equal Protection Clause*, 15 Harv. C. R. - C. L. Rev. 1 (1980).

5/ *See* *Traynor v. Turnage*, No. 86-622 (S. Ct., Apr. 20, 1988); *McKelvey v. Turnage*, No. 86-737 (S. Ct., Apr. 20, 1988).

The following reported cases have involved a challenge to a VA regulatory action or related policy:

Dumas v. Cleland, 486 F. Supp. 149 (D. Vt., 1980)

An action brought to challenge the method by which the VA terminated the status of a compensation beneficiary's wife as spouse payee of her husband's benefits.

Carter v. Cleland, 643 F.2d 1 (D.C. Cir., 1980) affirming 472 F. Supp. 985 (D. D.C., 1979)

An action brought by two surviving spouses of veterans to challenge the "birth by another rule" adopted by VA as part of the implementation of a statute defining the term "surviving spouse" as a person of the opposite sex who was the spouse of a veteran at the time of the veteran's death and who lived with the veteran continuously from the date of the marriage to the date of the veteran's death except where there was separation due to the misconduct of, or procured by, the veteran without fault of the spouse and who had not remarried.

Peed v. Cleland, 516 F. Supp. 469 (D. Md., 1981)

An action seeking to challenge the manner in which the VA calculates monthly VA pensions.

Brooks v. Cleland, 531 F. Supp. 103 (D., E.D. Mich., 1982)

An action challenging the determination of the VA that plaintiff was not entilted to retroactive dependency and indemnity compensation benefits for the death of her nephew.

Beauchesne v. Nimmo, 562 F. Supp. 250 (D. Conn., 1983)

An action brought by a widow against the VA challenging its recoupment of overpayment of veterans' benefits from what had been a joint account held by the widow and the veteran without giving the widow notice or an oppoprtunity to seek waiver of recoupment.

Gott v. Walters, 756 F.2d 902 (D.C. Cir., 1985)

An action challenging certain documents and methodologies used by the VA to help determine claims of injury from exposure to radiation during military service.

2.

Secretary of Labor of the Commonwealth of Puerto Rico v. Turnage, 657 F. Supp 1033 (D., P.R., 1987)

An action brought challenging discontinuation of veterans' disability benefits.

Winslow v. Walters, 815 F.2d 1114 (7th Cir., 1987)

An action alleging that certain determinations that VA made regarding a veteran's eligibility for service connection benefits were incorrect and that VA violated the veteran's due process rights in making a determination without providing a hearing.

Commonwealth of Puerto Rico v. Walters, 660 F. Supp. 1230 (D., P.R., 1987

An action challenging the reduction of Puerto Rico's veterans' 100% disability compensation benefits as discriminatory and unconstitutional.

Zayas v. Veterans Administration, 666 F. Supp. 361 (D. P.R., 1987)

An action brought against officers of the VA to challenge reduction of benefits as a violation of procedural due process.

Younger v. Turnage, 677 F. Supp. 16 (D. D.C., 1988)

An action brought by individual homeless veterans and organizations which served homeless veterans which challenged compliance of the VA with the Veterans Education and Training Act Amendments.

In addition, there are the following unreported cases:

Newman v. Walters:, No. 84-8026 (W.D.N.Y.)

A challenge to 38 C.F.R. § 3.700(a)(3) on recoupoment of disability severance pay. Dismissed on stipulation of the parties.

Stewart v. V.A., No. 84-1730 (E.D., Mo.)

A challenge to 38 C.F.R. § 3.665 limiting compensation paid toincarcerated felons. Summary judgment granted for the government.

3.

Semenchuk v. Walters, No. 84-3132 (N.D., Ill.)

A challenge to the VA notice and hearing procedures regarding pension reductions/terminations. Consent Decree.

Butler v. Turnage, No. 86-1310 (E.D., Mo.)

A challenge to 38 C.F.R. § 3.103(c) mandating hearings held only in VA regional offices. Dismissed as moot.

Franklin v. Turnage, No. 87-0640 (E.D., Mo.)

Same as Butler. Dismissed as moot.

Totten v. Turnage, No. 87-1056 (E.D., Mo.)

Same as Butler. Dismissed as moot.

Buck v. Veterans Administration, No. 86-1656 (E.D., Pa.)

A challenge to 38 C.F.R. §§ 3.301(c)(2) declaring primary alcoholsm to be willful misconduct. Third Circuit reversed and remanded to the district court consideration in light of McKelvy v. Turnage.

Nehmer v. Veterans Administration, No. 86-6160 (N.D., Cal.)

A challenge to regulations implementing Pub. L. 98-542. Pending.

CASES CHALLENGING VA'S REGULATIONS

Tinch v. Walters, 765 F.2d 599 (6th Cir. 1985)

The VA denied plaintiff's claim for a delimiting date extension on the basis that "primary alcoholism" constituted "willful misconduct," pursuant to 38 C.F.R. § 3.301(c)(2) and, thus, was not a legal basis for granting an extension. Plaintiff brought suit contending that this discriminatory regulation violated the Rehabilitation Act, and the Sixth Circuit found in favor of the plaintiff.

Traynor v. Turnage, 56 U.S.L.W. 4319 (U.S. April 20, 1988)

Analogous fact situation to the Tinch case. Although the district court found for plaintiff on the merits, this decision was reversed by the Second Circuit which dismissed the suit stating that under our finality statute; i.e., 38 U.S.C. § 211(a), the court lacked jurisdiction to hear the case. The Supreme Court in a consolidated decision with the McKelvey case, discussed more fully below, reversed the Second Circuit's decision and held that the court did have jurisdiction to hear the case because jurisdictional review is permissible when a subsequent statute, like the Rehabilitation Act, whose enforcement is not within the exclusive domain of the VA is involved.

On the merits, the Supreme Court determined, in upholding our regulation, that it is not inconsistent with the Rehabilitation Act for only those veterans whose disabilities are not attributable to their own "willful misconduct" to be granted an extension of the 10-year delimiting period applicable to all other veterans. The Court indicated that Congress is entitled to establish priorities for the allocation of the limited resources available for veterans' benefits and to conclude that veterans who bear some responsibility for their disabilities have no stronger claim to an extended eligibility period than do able-bodied veterans.

McKelvey v. Turnage, 56 U.S.L.W. 4319 (U.S. April 20, 1988)

Analogous fact situation to the Tinch and Traynor cases. District court found in plaintiff's favor. The District of Columbia Circuit Court of Appeals held that the VA's position that primary alcoholism constituted "willful misconduct" barring a delimiting date extension is discrimination based upon "conduct" and not discrimination based upon "handicap." The court, therefore, held that our regulation does not violate the Rehabilitation Act. In the consolidated opinion referred to above, the Supreme Court affirmed this decision.

2.

Peterson v. Turnage, Civ. No. 87-2388 (D.C. Ill. 1987)

Same fact situation as the three cases referred to above. This suit was stayed pending the outcome of the Supreme Court decision in Traynor and McKelvey.

Burns v. Nimmo, 545 F. Supp. 544 (N.D. Iowa 1982)

Analogous fact pattern as the above-mentioned cases. District court held that Congress has a rational basis for deciding that existing VA regulations relating to alcoholism would apply so as to preclude extending VA educational benefits to the veteran.

Crowne v. Walters, No. 82-0827 (D.C. 1982)

Plaintiff alleged that he was entitled to full-time benefits for attendance at a nonaccredited law school based upon his interpretation of 38 C.F.R. § 24.4274. VA interpreted it as requiring 3/4 time measurement in plaintiff's case. The VA counters that review of the Agency's interpretation of that regulation is not subject to judicial review under 38 U.S.C. § 211(a). The district court initially found jurisdiction, but deferred a final decision on its right to hear the case pending the outcome of the consolidated decisions in the Traynor and McKelvey suits.

Evergreen State College v. Cleland, 621 F.2d 1002 (9th Cir. 1980)

Educational institutions brought action challenging VA regulations, circulars and manuals regarding course measurement (38 C.F.R. 21.4272(a)) and standard class session (38 C.F.R. § 21.4200(g)). The court of appeals held that judicial review of VA regulations was permissible. On the merits, it found that the VA's regulations were reasonable and that the Agency was not required to accept the school's definition of full-time study in determining whether a veteran is entitled to benefits for a full-time course of study.

Wayne State University v. Cleland, 590 F.2d 627 (6th Cir. 1978), on remand, 473 F. Supp. 8 (D.C. Mich. 1979)

University and students brought class action suit against VA seeking declaratory and injunctive relief to prevent the VA from paying less than full-time benefits for students enrolled in the plaintiff school's weekend program. The VA maintained that the concentrated weekend course did not meet throughout the quarter and, thus, could not be measured as full time under 38 C.F.R. § 21.4272(d). Sixth Circuit held that our finality statute permits judicial review of VA regulations. Also, in upholding our regulation, the court determined that regulations issued by the Administrator requiring veterans to be enrolled in a course of study which scheduled at least 12 "standard classroom sessions" per week in order to qualify for full-time educational assistance benefits were promulgated within the scope of the Administrator's authority.

Merged Area X (Education) v. Cleland, 604 F.2d 1075 (8th Cir. 1979)

An accredited public institution of higher learning and student-veterans brought suit attacking VA's authority to define "semester hours." The Eighth Circuit held that the VA has not exceeded its authority in defining the statutory term "semester hours" as meaning 1 hour or 50 minutes in the classroom per week because it is within the VA's authority to make all rules and regulations which are necessary and proper to carry out the laws administered by the Agency.

The following cases within the past 10 years have challenged VA Loan Guaranty Regulations or VA's interpretation thereof:

1. Loan refunding cases:

a. Rank v. Nimmo, 677 F.2d 692 (9th Cir. 1982) rev'g 460 F. Supp. 920 (C.D. Cal. 1978). Cert. denied 459 U.S. 907 (1982).

b. Simpson v. Cleland, 640 F.2d 1354 (D.C. Cir. 1981).

c. Gatter v. Nimmo, 672 F.2d 343 (3d Cir. 1982), aff'g 512 F. Supp. 207 (E.D. Pa. 1981).

d. Laughlin v. Walters, 718 F.2d 513 (1st Cir. 1983).

e. Fitzgerald v. Cleland, 498 F. Supp. 341 (D. Maine 1980), aff'd in part and vacated in part on other grounds 650 F.2d 360 (1st Cir. 1981).

f. Bright v. Nimmo, 756 F.2d 1513 (11th Cir. 1985).

g. Waterfield Mortgage Co. v. Harrington, 657 F. Supp. 1368 (S.D. Ohio 1987).

These suits challenged VA's failure to take assignments (or "refund") guaranteed loans in default pursuant to 38 C.F.R. § 36.4318, and to provide additional assistance to enable veterans to avoid foreclosure. With the exception of the district court in the Rank case, which was ultimately reversed (see item a, above), the courts unanimously held that VA loan servicing decisions were committed to Agency discretion by law, and that no cause of action existed to challenge VA's failure to refund a loan or otherwise require loan holders to grant forbearance. Thus, all cases resulted in judgments for the Government.

2. First valid sale cases:

a. Mortgage Associates v. Cleland, 651 F.2d 476 (7th Cir. 1981).

b. Mortgage Associates v. Cleland, 653 F.2d 1144 (7th Cir. 1981).

VA has traditionally interpreted the governing law and regulations to provide that the first valid foreclosure sale sets the rights of the parties. If a loan holder, through unilateral mistake, overbids for the property at such sale, VA would base its guaranty claim on such bid. VA would not honor the results

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of a subsequent sale. See VA Solicitor's Opinion 122-51. Two cases involving the same parties were argued before the same panel of the 7th Circuit on the same day. In the case reported in 651 F.2d, the court ruled that the loan holder's failure to provide VA and the veteran advance notice of its motion to set the first sale aside violated VA regulations and due process. Thus, VA was not bound by the second sale. In the case reported in 653 F.2d, however, the court held that VA was bound by the second sale. The results of these two cases are difficult to reconcile.

3. Century Federal Savings and Loan Association of Long Island v. Roudebush, 618 F.2d 969 (1980).

Holder of two VA guaranteed loans challenged VA's refusal to pay guaranty claims. VA's refusal was based on the fact that certain signatures on loan instruments were forged. 38 C.F.R. § 36.4325(a). The court upheld VA's regulation on forgery, and granted judgment to the Government.

4. Union Mortgagee Corp. v. Roudebush, 471 F. Supp. 798 (E.D. N.Y. 1979).

Lender challenged VA's offsetting its loss on a guaranteed loan against other claims submitted by the lender. VA contended its loss resulted from material misrepresentations made by the lender regarding the veteran's income and credit. Such offset was permitted by 38 C.F.R. § 36.4325(a)(1). The court upheld VA's action.

5. Wells v.-U.S. Administrator of Veterans Affairs, 537 F. Supp. 473 (1982).

Former owners of homes purchased with VA guaranteed loans that had been foreclosed sued to enjoin VA from evicting them from these homes. Plaintiffs sought to require VA to rent these homes to them for some unspecified period of time. Plaintiffs claimed, among other things, a constitutional due process property right to the continued occupancy of their former properties. The court ruled that VA was free to dispose of the properties in any way necessary to preserve the Loan Guaranty Revolving Fund, and dismissed the suit.

6. U.S. v. Vallejo, 660 F. Supp. 535 (W.D. Wash. 1987). The Government brought this suit to collect an indemnity debt pursuant to 38 C.F.R. § 36.4323(e) following the payment by VA of a claim on the veteran's guaranteed loan. The veteran defended the suit by claiming that VA's regulation on indemnity

violated Washington State's law prohibiting a loan holder from collecting a deficiency if the loan was foreclosed nonjudicially. The court ruled that VA was bound by Washington State law, and denied VA the right to collect this debt.

NOTE: Since the opinion in Vallejo was issued, the Government has become involved in at least five suits where veterans are claiming that VA may not enforce its indemnity regulation since such regulation conflicts with State foreclosure law. These cases are now pending in the Federal district courts in Washington State, California, Utah and Arizona. Three of these cases (two in Washington and one in California) were brought as class actions to enjoin VA collection of deficiencies and to seek refunds of moneys already collected. The suits in Arizona and Utah are collections actions brought by the Government where a Vallejo defense has been raised. Motions by the Government for rulings on this legal issue are pending.

STATEMENT OF MARSHALL J. BREGER

CHAIRMAN

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

To The

SENATE COMMITTEE ON VETERANS' AFFAIRS

On

S. 11 and S. 2292

APRIL 25, 1988

Mr. Chairman and Members of the Committee:

I am pleased to respond to your request for the views of the Administrative Conference on S. 11, the "Veterans' Administration Adjudication Procedure and Judicial Review Act," and S. 2292, the "Veterans' Judicial Review Act." In considering those views, it is essential that the committee understand the role of the Conference and the manner in which it reaches positions on issues.

The Conference is an independent Federal agency whose statutory mission is to perform studies and recommend improvements in the administrative procedures used by Federal departments and agencies.[1] We try to assist Congress, the executive branch, and the independent agencies in developing procedures that provide greater fairness and expedition for participants in the administrative process, more effective attainment of agencies' goals, and lower costs to the taxpayers.

We have 101 members -- 61 from the departments and agencies in the Federal Government and 40 from the private sector. All of the individuals are chosen because of their experience with issues of the administrative process. I serve as Chairman of the Conference, and head a small full time staff.

The Conference takes formal positions only through the vote of our total membership at our semi-annual plenary sessions. The Conference operates, however, through a committee system. Each member serves on one or more committees. The committees ordinarily act on the basis of reports and proposed recommendations prepared by consultants, often academics, engaged by the Office of the Chairman. A committee will usually meet several times in the course of considering a report and preparing a recommendation. We seek comments from affected agencies and interested members of the public. Occasionally, the proposal will be published in the Federal Register in order to obtain an even broader range of views. When the committee reports out a recommendation, it is referred to the Council of the Conference, our board of directors, for placement on the agenda of the next plenary session. When a proposed recommendation reaches the Assembly of the Conference at the plenary session, it may be amended, approved, defeated or tabled. If approved, it becomes an official position of the Conference; it is published in the Federal Register and the Office of the Chairman of the Conference sees that it is brought to the attention of those to whom it is relevant. With that background in mind, let me turn to those aspects of the subject bills the Conference has examined.

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[1] See 5 U.S.C. § 574.

S. 11 would establish certain procedures for the adjudication of claims for benefits under laws administered by the Veterans Administration, bring the VA's rulemaking activity under the strictures of the Administrative Procedure Act, provide for judicial review of final benefit claims decisions of the Administrator, and authorize the payment of reasonable attorneys fees for those representing claimants seeking benefits. S. 2292 would likewise bring the VA's rulemaking activity under the requirements of the APA. In addition, it would permit claimants to challenge VA regulations before a newly constituted and more independent Board of Veterans' Appeals, which would have a Chairman and Vice Chairman appointed by the President with the advice and consent of the Senate, and other members appointed by the Chairman with the approval of the President. It would subject Board of Veterans' Appeals decisions on those regulations to judicial review in the Courts of Appeal and allow the Board of Veterans' Appeals to award attorneys fees in certain circumstances. The Conference has looked at three of these matters --namely, applying the APA to VA rulemaking proceedings, review of rules by independent tribunals, and authorizing judicial review of VA decisions. So I can offer some observations on these. It has not considered the other matters which the bills address and I offer no views on them.

1. Rulemaking

In section 553 of the Administrative Procedure Act (APA), Congress provided that the public ordinarily have an opportunity to participate in an agency's rulemaking process. This aspect of the APA is intended to assure that Federal agencies have the benefit of information and opinion that can be supplied by persons whom regulations will affect. The procedures to assure this opportunity are not required, however, in certain narrow circumstances, such as where government benefits programs are involved. This exception was established by the original APA in 1946 because benefits programs were deemed to be among the "proprietary" functions of the Federal government.[2] But rules governing benefits programs can nonetheless bear heavily upon non-governmental interests. As a consequence, the Conference, in one of its earliest recommendations, urged the Congress to remove the exemption from notice and comment rulemaking requirements for benefits programs, as well as other aspects of the so-called "proprietary exemption" (i.e., property, loans, grants, benefits and contracts).[3] This has not occurred. But both Congress and certain agencies have, either through legislation or administrative practice, effectively eliminated the exemption in certain circumstances. The Social Security benefits program is a prime example.

In the Conference's view, elimination of such exemptions strengthens procedures that make for the type of fair, informed exercise of rulemaking authority that is now prevalent throughout the governmental process as a whole. Because both S. 11 and S. 2292 would specifically adopt the Conference's recommendation as it pertains to rulemaking affecting veterans benefits claims, the Conference supports their enactment in this regard.

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[2] See Attorney General's Manual on the Administrative Procedure Act 27 (1947).

[3] Recommendation 69-8: Elimination of Certain Exemptions from the APA Rulemaking Requirements, 1 CFR 305.69-8 (1988).

2. Review of Rules By The Board of Veterans' Appeals

S. 2292 would reconstitute the Board of Veterans' Appeals, with Presidential appointees as Chairman and Vice-Chairman. It would give the Board new power to review the validity of Veterans Administration regulations if they are challenged by a claimant during the course of an adjudication. The Conference has not studied the role of the Board of Veterans' Appeals and has no opinion as to whether a reconstitution of the Board and a basic redirection of its role is necessary or desirable. But we have studied the more general problem of review of agency regulations by a separate and independent administrative tribunal. I am happy to share our findings on that issue with you.

In 1986, the Conference examined what we described as a "split enforcement model," i.e., a situation in which one agency is responsible for the enactment and enforcement of regulations or standards and a separate, independent agency is responsible for adjudicating those enforcement actions. We examined the model in light of provisions of the Occupational Safety and Health Act, which charged the Department of Labor (through the Occupational Safety and Health Administration, or OSHA) with enforcement responsibility before the Occupational Safety and Health Review Commission (OSHRC), and the Federal Mine Safety and Health Amendments Act of 1977, which also gave the Department of Labor enforcement authority (this time, through the Mine Safety and Health Administration, or FMSHA) before the independent Federal Mine Safety and Health Review Commission (FMSHRC). (See Recommendation 86-4: The Split-Enforcement Model for Agency Adjudication, 1 CFR 305.86-4, a copy of which is appended.)

Our consultant, Professor Robert Johnson of George Mason University Law School, acknowledged the surface appeal of such a model. It can provide greater public confidence in the overall program, enhance the prospects for due process, or, at a minimum, to use

Professor Johnson's words, provide "simply a quick solution to a troubling political problem."[4] Neither Professor Johnson nor the Conference, however, was prepared to say that such a split enforcement model was superior to conventional administrative separation of functions within the same agency. But both Professor Johnson and the Conference were agreed that, in any legislative bifurcation of rulemaking and adjudicatory responsibility, the adjudicatory body should accept the policy agency's interpretation of a standard unless it could be shown that the rulemaking agency's interpretation is arbitrary, capricious or otherwise not in accordance with law. That is because the rulemaker is generally charged by Congress with overall policy responsibility. S. 2292 would run counter to our recommendation.

There are plainly several key differences between the OSHA or MSHA model, on the one hand, and the proposal to re-establish the Board of Veterans' Appeals within the Veterans Administration and give it new decisional powers, on the other. The VA, after all, is a claims agency not an enforcement agency. And clearly the experience gleaned from the occupational health and safety area cannot simply be transferred to the very different world of veterans' claims. But, like the Department of Labor, the VA has overall program responsibility for the handling of veterans' claims and it fulfills that responsibility, at least in part, through the adoption of regulations and interpretations designed to implement its responsibility. Congress presumably holds the Administrator responsible for the VA's actions. The assignment of responsibility to the Board of Veterans' Appeals to determine the validity of the Administrator's regulations, even if the Administrator could thereafter seek review in the Court of Appeals for the Federal Circuit, as provided in the bill, will plainly give the new board a critical and central role in the enactment of VA policy. Whether such new role is necessary or desirable is a question for the Congress to consider, and ultimately answer.

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[4] Johnson, The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences, Report to the Administrative Conference of the United States (August 30, 1986), in Administrative Conference of the United States, Recommendations and Reports 333 (1986).

3. Judicial Review

The Conference has examined the question of whether judicial review ought to be available for VA benefit determinations. In contrast to our views on the applicability of APA rulemaking procedures to claims issues, and our pronouncements on the proper role of an adjudicatory tribunal when reviewing an agency's regulations, the question of judicial review is one on which the Conference has not taken a formal position. Rather, after full debate, the Conference expressly decided not to take a position. But I believe that our experience studying the issue may nevertheless be of some help to the committee in its deliberations.

In 1978, our Committee on Judicial Review recommended that the law precluding judicial review be changed to allow judicial review at the instance of any person adversely affected or aggrieved. That recommendation was vigorously debated by the full membership at our December, 1978 plenary session, but was eventually tabled. For your information, I have appended a copy of our Judicial Review Committee's 1978 recommendation and the transcript of the December 1978 plenary session deliberations. They reflect, I believe, all of the pros and cons on the issue by some of the nation's foremost legal scholars, judges and practitioners. That debate demonstrates that the issue does not lend itself to easy resolution. Let me briefly outline what I believe to be the key areas of debate.

Congress has stated explicitly that benefits decisions of the Veterans Administration "shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise."[5] While insulation of VA decisions from judicial review is longstanding, it does run counter to the general principle expressed in the Administrative

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[5] See 38 U.S.C. § 211(a).

Procedure Act and in judicial decisions that a person adversely affected or aggrieved by an administrative action is entitled to judicial review.[6] It was for that reason (and because proposals for judicial review were then pending in Congress) that the Administrative Conference undertook a study of the problem in the latter half of 1978.

We commissioned Professor Frederick Davis of the University of Missouri School of Law to do the study; Professor Davis is a recognized expert who had previously done some work in the area. Professor Davis' report, Judicial Review of Benefits Decisions of the Veterans Administration, a copy of which I am including with this statement, was referred to the Conference's Committee on Judicial Review. The Committee met twice in October, 1978, to consider the report and proposed recommendation, obtained the views of the Veterans Administration, the Department of Justice, and the principal veterans' organizations, and approved the recommendation which called for legislative action to permit judicial review of Veterans Administration decisions. The recommendation emphasized, however, that it was not calling for any change in the VA's informal decisionmaking procedures. Furthermore, the recommendation urged what was believed to be a rather narrow form of court review -- i.e., whether, on the basis of the administrative record compiled by the VA, the court could determine that the VA's action was unlawful, arbitrary or capricious.

The Judicial Review Committee proposal was presented to the Assembly of the Conference at its Eighteenth Plenary Session in December, 1978. After a vigorous debate, it was decided to table -- in essence, to take no action on -- the proposal.

Briefly, the position of Professor Davis and the Judicial Review Committee was that the principle of unreviewable administrative action -- at least with respect to cases of this kind which do not involve delegations of broad administrative discretion, but rather the application of specific statutory standards to individual situations -- is wrong and contrary to general administrative practice. Furthermore, while the proponents admitted that they could not show that the VA's administrative processes worked badly or unfairly, there was anecdotal evidence of occasional arbitrariness. It was also argued that, without judicial review as a means of inquiring into the VA's practices, it would be hard to say how well the system as a whole works. Finally, it was urged that under the Committee's proposed recommendation, which called for a fairly narrow standard of judicial review, it was unlikely that the additional burden on the courts would be significant.

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[6] See 5 U.S.C. § 702; Lindahl v. Office of Personnel Management, 470 U.S. 777, 778 (1985), citing Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967).

The opponents of the proposal, notably Professor Kenneth Culp Davis, the late Judge Harold Leventhal, and former Conference Chairman and now Justice Antonin Scalia, argued that the nonreviewability of VA determinations is not unique and that there was insufficient showing that the present system was not working well. They feared that there would be an additional burden on the courts and doubted that occasional review by Federal judges unfamiliar with VA's statutes and regulations would really improve the results in VA cases. Finally, the argument was made that even though the recommendation did not call for more formality in VA procedures, the prospect of judicial review would tend to have that effect.

In the end, the Assembly voted to table the proposal. Clearly, that was not a positive endorsement of the existing law. Rather, it reflected a judgment that the case for the proposed recommendation was not proven. While a decision to table does not necessarily foreclose future Conference action, the Conference staff and members of and the Judicial Review Committee believed that there was nothing to be gained by pursuing the subject further at that time. No action has been taken since 1978.

The fact that the Conference was sufficiently divided on the issue of judicial review to table the recommendation and that the matter remains a contentious one a decade later suggests that there is merit on both sides. Perhaps that also suggests that the Congress might wish to consider some middle ground. In the course of the Conference's 1978 debate, a number of proposed "middle positions" were suggested. One was to permit judicial review, but only as to constitutional questions or only as to questions of law; that is to say, review of the reasonableness of particular factual determinations would be excluded. Another option was to provide review, but in a specialized court, a Court of Veterans Appeals. Still another possible approach, although it did not figure in the debate, is suggested by an earlier Conference recommendation, and that is for improvements in the quality control procedures within the Veterans Administration.[7] Whether any of these options is to be preferred to a reversal in the law of judicial review of VA decisions will depend on Congress' perception of what problems exist with the current system. If Congress believes, for example, that there are inherent problems with the law governing veterans' benefits, changes in the law rather than judicial review is a more reasonable solution. If Congress believes, instead, that there is arbitrariness in the VA's interpretation of the statutes, judicial review limited to questions of law, such as the VA's interpretation of its statute, might be a useful alternative. If the problem is inconsistency, bias or other weaknesses in the VA's decisional process, judicial review under a narrow standard of review could likewise provide some relief. But improved managerial controls, a specialized reviewing body, or, perhaps, an agency ombudsman, might be an equally, if not more constructive, solution. Finally, if Congress believes that the problem lies essentially in the VA's governing regulations, it could adopt the approach of S. 2292, or require notice and comment rulemaking for such regulations and allow aggrieved parties to challenge the VA's rules in court in the same way that affected parties may now attack the promulgation of regulations, or the denial of a petition for repeal or amendment of existing regulations, by other agencies.

You have asked us specifically to comment on whether judicial review, if made available, should be in the Courts of Appeal or the District Courts. The Conference studied this issue on a government-wide basis in 1975.[8] Briefly summarized, the Conference found that agency determinations based on trial-type hearings and rules required by statute to be based on a hearing should generally be made directly reviewable in the Courts of Appeal. District Court review would be appropriate only if the action to be reviewed is of a type that rarely involves issues of law or broad social or economic policy and District Court review would significantly reduce the workload of the appellate courts. Direct review of rules by the Court of Appeals is ordinarily appropriate whenever a District Court decision respecting the validity of a regulation will likely be appealed in any event or the public interest requires prompt, authoritative determination of the rule's validity. If Congress decides to require notice and comment rulemaking procedures for VA rules, with subsequent judicial review, the VA's rules would appear suitable to direct Court of Appeals review as proposed in S. 2292.

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[7] See Recommendation 73-3: Quality Systems in the Adjudication of Claims of Entitlement to Benefits or Compensation, 1 C.F.R. 305.73-3 (1988).

[8] Recommendation 75-3: The Choice of Forum for Judicial Review of Administrative Act, 1 CFR 305.75-3 (1988).

4. Summary

The debate in 1978 revealed that the membership of the Conference did not have a strong sense that they knew what was wrong, or, indeed, that they knew that anything was wrong, with the VA's administration of benefits claims. Consequently, they were reluctant to prescribe a solution. The Committee, therefore, may wish to focus its inquiry on the specific perceived weaknesses in, or grounds for dissatisfaction with, the Veterans Administration's own processes. Your conclusions on these questions are likely to influence your judgment as to whether there should be judicial review and what form that review should take or whether some other remedy will be equally or more efficacious.

[Attachments are retained in the committee files.]

STATEMENT OF

ANTONIO J. CALIFA, LEGISLATIVE COUNSEL

AND

MORTON H. HALPERIN, DIRECTOR
WASHINGTON OFFICE

ON BEHALF OF

THE AMERICAN CIVIL LIBERTIES UNION

ON

S.11

VETERANS' ADMINISTRATION ADJUDICATION
PROCEDURE AND JUDICIAL REVIEW ACT

AND

S.2292

VETERANS JUDICIAL REVIEW ACT

BEFORE

UNITED STATES SENATE
VETERANS' AFFAIRS COMMITTEE

April 28, 1988

Mr. Chairman and Members of the Committee:

We appreciate the opportunity to submit testimony concerning S.11 and S.2292, both of which establish procedures relating to the adjudication of veterans' benefits. We strongly support S.11, and commend you for your long and dedicated efforts to extend to veterans the right to counsel and the right to judicial review. These rights are vital and veterans have been denied them for too long.

The American Civil Liberties Union, a membership organization with 250,000 members, sees as its main purpose the protection of individual liberty as defined in the Bill of Rights. We believe that the present system of adjudicating claims for veterans' benefits is anachronistic, paternalistic, and inadequate in its protection of claimant's civil liberties.

BACKGROUND

Since the Revolutionary War, the United States has provided some form of benefit for veterans of the Armed Forces and their survivors. In 1930 the Veterans' Administration (VA) was founded. One of its primary duties is to decide which veterans are entitled to benefits and the amount of benefits to which they are entitled.

The VA process is set in motion when a veteran submits a claim to a regional office. The veteran, or his or her survivors, claim that he is entitled to compensation due to a service connected death or disability. A rating board, typically made up of a "medical specialist", a "legal specialist", and an "occupational specialist", examine the claim. The issues before the board are the extent of the disability (expressed in percentages i.e., 30% disabled) and whether it was service connected. A claimant is notified of the decision, and if he feels he has been treated unfairly may appeal the rating board's decision to the Board of Veteran Appeals (BVA).

The BVA then conducts another hearing, an _ex parte_ hearing, with no formal questioning or cross examination and no formal rules of evidence. At appearances before the BVA the veteran can be represented by a "service agent". These agents are provided to the veteran by various veterans' organizations.
Once the BVA reaches a decision on the veteran's appeal, the decision is final.

What's wrong with this system? Two features distinguish the VA adjudicatory system and make it unique and, we state, uniquely unfair. The veteran is effectively and constructively foreclosed from representation by an attorney. Also, once the BVA makes its decision on the veteran's claim, there is no further appeal. Judicial review of the decision by the BVA is foreclosed. For the vast majority of veterans, the BVA _is_ the Supreme Court, a court he or she must face without benefit of counsel.

REPRESENTATION BY AN ATTORNEY -

In 1862, Congress passed a law that limited attorneys who represented veterans to a fee of $5. Two years later, the fee amount was generously doubled to $10. Many things have changed in American society in the subsequent 124 years, but not that fee. A veteran may pay an attorney only $10 to represent him. This is a total prohibition of any payment in excess of $10. If an attorney is paid directly or indirectly more than $10, the attorney faces criminal sanctions--up to two years at hard labor. As Mr. Justice Stevens stated in his dissent in Walters v. NARS, 87 L. Ed. 2d 220 (1985), Congress intended by this statute to protect veterans from exorbitant fees. At that time, an attorney was called upon to fill in a form on behalf of the veteran. Further, the $10 fee would be the equivalent of $580 today. Mr. Justice Stevens concludes that it was not the intent of Congress to prohibit representation of veterans by counsel. Congress wanted to control the fee charged by lawyers for the simple process of filling out a form.

What may have been benevolent social policy in 1864 is bad law today. No longer are veterans protected from lawyers charging exorbitant fees, they are effectively denied representation by lawyers who charge reasonable fees. The VA admits that the fee limitation of $10 has the effect of depriving veterans of assistance of counsel, S.Rep No. 97-466, p. 102 (1982).

The 1864 law has not only outlived its usefulness in economic terms. This law was passed at a time when claims were far simpler. Both the disabilities and claims made by veterans for disability compensation were far simpler. The claim usually involved the filing of a form. The injuries were self-evident.

Civil war veterans did not have radiation poisoning or Agent Orange as a basis on which to claim compensation. Psychological and psychiatric wounds of war were recognized in a very rudimentary way by the medical profession, and not at all by officials determining compensation.

Claims are far more complex now. The effects of service related injuries take longer to manifest themselves. Medical problems like delayed stress syndrome may not appear until years after the precipitating event. Radiogenic disabilities are also in this category of delayed development. In testimony before the House Human Resources and Intergovernmental Relations Subcommittee of the Committee on Government Operations, a pro bono lawyer representing a World War II veteran detailed injuries he suffered as an alleged result of exposure to radiation. This veteran, who was sent to Nagasaki shortly after the bombing, was also exposed to radiation during the tests of atomic weapons in Nevada.

> "Very soon after the blast, Warehime experienced nausea and vomiting, his skin appeared sunburned, and within a day he began to suffer from diarrhea. These are classic acute symptoms following exposure to significant amounts of ionizing radiation. In the ensuing years, Warehime has developed numerous potentially radiogenic disabilities, including sterility (diagnosed in 1958), loss of teeth (between 1954 and 1957), osteoporosis (diagnosed in 1977), lung cancer (squamous cell carcinoma, first diagnosed in 1982), healing disorders, and deterioration and atrophy of muscles, bones and nerves."

Testimony of William C. Morison-Knox February 18, 1988.

In summary, there are excellent policy reasons for allowing veterans to choose attorneys to represent them.

We believe that the present system is constitutionally suspect. The Fifth Amendment to the Constitution states, "No person shall be...deprived of life, liberty, or property without due process of law". Due process is a cornerstone of our national commitment to fundamental fairness and individual liberty. In the past 28 years, the Supreme Court has held that the following interests are entitled to some type of due process hearing prior to government action: (1) student suspension from school, Goss v. Lopez, 419 U. S. 565 (1975); (2) temporary termination of public assistance, Goldberg v. Kelly, 397 U.S. 254 (1970); (3) teacher tenure, Perry v. Sindermann, 408 U.S. 593 (1972); (4) wages and salary, North Georgia Finishing Inc. v.DI-Cheminic., 419 U.S. 601 (1975); (5) personal property, Fuentes v. Shavin, 407 U.S.67 (1972); (6) parole, Morissey v.Brewer 408 U.S. 47 (1972); (7) probation, Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979); (8) public employment, Elrod v. Burns, 427 U.S. 347 (1976); (9) public utility service, Memphis Light, Gas and Water Division v. Craft, 436 U. S. 1(1978); (10) driver's license, Bell v. Burson, 402 U. S.535 (1971); (11) social security disability compensation, Matthews v. Eldridge, 424 U. S.319 (1980); and (12) transfer from a prison to a mental hospital, Vitek v.Jones, 445 U. S. 480 (1980).

The seminal modern case on procedural due process is Goldberg v Kelly, 397 U.S. 254 (1970) which held that due process requires an adequate hearing before welfare benefits can be terminated even if the termination is for a brief interval. The

Goldberg Court identified the elements of procedural due process. Among other things, procedural due process means the ability to retain counsel. Additionally, an adequate hearing includes the opportunity to present oral argument, present witnesses, and cross examine adverse witnesses. Thus, many of the Goldberg requirements would seem to be violated by the denial of counsel to veterans.

When presented squarely with the opportunity to give veterans the right to employ counsel, a right taken for granted by other Americans, the Supreme Court held that Congress had the right to limit attorney's fees to $10, Walters v. National Association of Radiation Survivors, 473 U. S. 305 (1985). Mr. Justice Rehnquist reasoned that the VA system worked well most of the time. Without conceding that highly debateable conclusion, it is appropriate to observe that the Fifth Amendment right to due process is an individual right, not one which can be violated if the majority of similarly situated individuals receive due process. We believe that the correct view of the law is to be found in Justice Stevens' dissent.

> "The Court does not appreciate the value of individual liberty. It may well be true that in the vast majority of cases a veteran does not need to employ a lawyer...and that the system of processing veteran benefit claims, by and large, functions fairly and effectively without the participation of retained counsel. ...Everyone agrees, however, that there are at least some complicated cases in which the services of a lawyer would be useful to the veteran and, indeed, would simplify the work of the agency by helping to organize the relevant facts and to identify the controlling issues. ... What

> is the reason for denying the veteran the right to counsel of his choice in such cases?" (Citations Omitted).

JUDICIAL REVIEW

Judicial Review is part of an individual's right to fundamental fairness, and protects against arbitrary governmental action. The concept of judicial review is embedded in the Constitution and has played a vital part in the development of the American system of government. Not only is judicial review an important right for individuals but it is a part of the system of checks and balances. The federal judiciary, because of lifetime tenure, is the branch of government least susceptible to current political trends. Through judicial review, an individual has the right to ask for a decision that comports with the law.

38 U.S.C. 211(a) reads, in part, as follows:

> "The decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise."

Veterans do not have judicial review. Recipients of social security benefits or unemployment compensation are entitled to judicial review. Almost every government agency can be sued if a citizen feels they have been wronged. A few categories of people who do have judicial review include prisoners who want access to a law library, poor people who are denied welfare benefits, applicants for government jobs who are not hired, mental patients who seek a change of their medical treatment, immigrants who are denied status as United States citizens, users of national parks who oppose development, and elderly citizens who are denied social security.

Oddly enough, some veterans can get judicial review of disability claims. There is a "two-track" system for the determination of benefits. The VA runs one. The individual military services run a separate system. The service system pays higher benefits according to the last rank held by the veteran. Thus, higher income veterans tend to use the service system, while average income veterans and low income veterans tend to use the VA system. Ironically, those veterans that use the service system can get their claims reviewed by the courts. The much greater number of veterans and, arguably, the needier veterans are barred from the courts by §211(a), see Istivan v. United States, 689 F. 2d 1034 (1982). Given this allowance for judicial review for some veterans, it is hard to defend the present system, which denies judicial review to most veterans.

The Administrative Procedure Act, 5 U. S. C. §§ 701 et.seq., gives a federal court jurisdiction to hear the claims of a "person suffering legal wrong...or adversely affected or aggrieved by (final or otherwise reviewable) agency action ... within the meaning of a relevant statute" so long as there are no statutes precluding judicial review. The APA clearly states that any person can seek review of an agency action. That is the rule.

The exception is reserved for veterans by § 211. Why would anyone fear providing our veterans the option of seeking an independent review of a negative VA decision?

S.11

S.11 would correct the glaring problems with the present system of adjudicating veterans' benefits. At the same time, this legislation would try and keep some of the features of the present system which are worth keeping. The bill is clearly a compromise, and in some respects, does not go as far as our reading of the Constitution would dictate. We support it enthusiastically because it is a vast improvement over the current system.

RIGHT TO COUNSEL

In an effort to be reasonable, the sponsors even kept the $10 limit. If a veteran's claim is resolved at the initial administrative level, the maximum fee that a lawyer can receive is $10. For actions at other levels of administrative adjudication, an attorney can receive up to 25% of the amount recovered if there is a contingent fee arrangement. If there is no such agreement, the attorney can receive either the flat fee that he and his client have agreed to or $500, whichever is less. In extraordinary circumstances, the Administrator may agree to a fee in excess of $500.

In cases involving judicial review, client and attorney may enter into a contingent fee arrangement, but that arrangement is limited to 25% of the amount recovered as a result of the attorney's efforts. If the attorney loses a judicial review case, the court may take into account the amount of time spent by the attorney on the case and compensate him up to the amount of $750. Finally, in a judicial review situation, the court may award to a prevailing party reasonable attorneys' fees in accordance with 28 U.S. §2412(d), the Equal Access to Justice Act.

This is not a perfect solution. It seems to us that some of the attorneys' fees that are made available are still too low. Again, because it will attract competent counsel, which the present system forecloses, we support the changes S.11 makes relating to attorneys' fees.

JUDICIAL REVIEW

As with attorney's fees, S.11 proposes limited reforms to the present system. The bill allows a veteran to appeal any final decision of the Administrator which is adverse to the veteran in a matter involving a claim for benefits under any law administered by the VA. The appeal would be to a federal district court. We feel that a district court is the appropriate level to which veterans' benefits cases should be appealed. Generally, district courts are the courts which review final agency action under the Administrative Procedure Act. Judicial review of agency action under the APA has worked well, and we see no reason to change the level of the reviewing court for veterans.

The scope of review is limited. A court may not conduct a trial *de novo* of findings of fact made by the Administrator. When reviewing a finding of material fact made in reading a decision on a benefit claim, the court may set it aside only when the material fact is "so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice would result if such finding were not set aside". Further, even if the Court sets aside the fact finding, it can only remand the case to the Administrator, who must then make new findings not inconsistent with the Court's opinion. When a final agency decision is adverse to a party and the sole stated basis for such decision is the failure of the party to comply with VA regulations, the court shall review only questions raised as to compliance with and validity of the regulation.

The limits on judicial review are readily apparent. A fact finding by the VA can be set aside only when it is *utterly* lacking in a rational basis and would result in a grievous injustice. We note that finding that a decision lacks a rational basis is indeed difficult. In litigation under the equal protection clause of the Fourteenth Amendment, a determination that the challenged category should be subject to the rational basis test means in the overwhelming majority of cases that the category would be upheld. In short, it is difficult for a reviewing authority to find that no rational basis exists for a particular decision, Tribe, *American Constitutional Law*, p.996

(1978).

It is also useful to compare the judicial review sections of the bill with the provisions of the APA. The scope of review under the APA is not as restrictive as it is under S.11. A reviewing court can set aside agency fact findings that are arbitrary, capricious or otherwise not in accordance with law. A reviewing court can set aside findings made by the administrative agency at a hearing if the court finds that they are unsupported by substantial evidence. Further the reviewing court can, in some cases, hold a trial de novo and, in those cases, it may set aside agency fact findings if the findings are "unwarranted by the facts", 5 U. S. C. § 706.

Clearly, S.11 provides much greater deference to VA fact findings than is the rule in judicial review of administrative actions.

S.2292

On April 18, 1988 Sen. Murkowski introduced S.2292. In his remarks introducing the bill, the Senator said that passage of his bill would result in a similar degree of benefit to veterans as would S.11 but would avoid "the very high costs that the changes in the system for adjudicating veterans' benefits called for by S.11 would likely bring about."

S.2292 has several major provisions concerning attorney's fees, judicial review of veterans' benefit claims, and the BVA's relationship to the VA.

S.2292 would allow attorneys' fees in very limited circumstances. If a veteran challenges the VA rulemaking authority or the validity of regulations used in his or her case, attorneys' fees are available. The amount of the fees vary with the level of review and whether or not the challenge was successful. The circumstances under which attorneys' fees are available present problems. S.2292 only allows access to counsel when the legal validity of a regulation or rulemaking procedure is involved. When a veteran feels that the VA has reached the wrong decision based on a misunderstanding of facts, no attorney's fees are allowed.

Indeed, this fact-law dichotomy is seen throughout this bill. Judicial review is available when the validity of a regulation is challenged, but not when the application of facts to a veteran's claim is involved. Judicial review of the agency's rulemaking procedure is also provided.

S.2292 provides a very narrow basis for judicial review. The fact determinations of the VA are final. They cannot be reviewed or discarded. S.11 would allow a court to overrule fact findings of the VA when they are so totally lacking in a rational basis that a grievous injustice would result. As has been discussed previously, the S.11 standard is already a substantial departure, and a significant loosening, of the APA standard. The S.11 standard would seem to give the VA more latitude in its determinations of fact than any other federal agency has. There is no good reason to go as far as S.2292 does--totally insulating the VA from any review of its fact determinations.

The reasons offered by the sponsor of S.2292 when he introduced the bill are as follows: 1) the VA process is a nonadversarial one; 2) the process "ain't broke" so why fix it; 3) a change to the S.11 system with judicial review and attorneys' fees would cost too much.

Let us examine these arguments briefly. To the extent that the VA system is nonadversarial, S.11 allows it to remain that way. If a veteran is satisfied with the outcome of his claim before the regional panel, he will not appeal it. Further, since S.11 still restricts attorneys to $10 in representing veterans before the regional panel, it is likely that not many attorneys will be representing veterans at the initial stage. It is only when a veteran is dissatisfied with a determination, that the judicial review and attorneys' fees provisions come into play. If a veteran is so unhappy with the VA decision that he wants to appeal it, he is already in an adversarial position with the VA. Being in such a position, he should have access to an attorney.

Is the system "broke"? It may or may not be "broke", but it is fair to say that it does need some fixing. The fact that Sen. Murkowski introduced S.2292 is evidence that he sees some problems with the present adjudications system. Veterans' organizations, to our knowledge, all seek some form of judicial review. The testimony of many veterans over the years and as recently as February 18, 1988 before the House Committee on Government Operations, shows that many veterans are not only dissatisfied with the way the VA has handled their claims, but also very unhappy with a system that denies them judicial review and makes the VA their Supreme Court. It is our belief that even assuming arguendo that the VA system is not "broke", the denial of judicial review and representation by an attorney is so unfair that reform is needed.

Finally, there is the argument that judicial review and representation by an attorney will cost too much. Costs could increase only if the VA is not fulfilling its mandate. If the VA is adjudicating claims fairly, then under S.11 reviewing courts will not overturn VA determinations. More fundamentally, when basic rights are involved, like the right to fundamental fairness and procedural due process, the fact that some cost may be entailed is not sufficient to deny the right. It is simply extremely inappropriate to deny veterans rights which are given so many other groups because of budgetary considerations.

S.2292 is an improvement of the current law. It provides for greater independence of the BVA from the VA. The bill makes clear that the VA is subject to the Administrative Procedure Act in its rulemaking function. S.2292 also improves upon the current system in providing for judicial review and access to attorneys. In the last two areas, the reforms are too limited.

CONCLUSION

We urge this Committee to report this legislation (S.11) favorably. There is no good reason to deny veterans the vital rights of judicial review and access to counsel to present their claims. S.11 is a bill that would solve the long-standing problems that have plagued the system of adjudication by which veterans' claims are determined. The bill keeps as much of the present system intact as possible. Those parts of the system that do not cause concern are left in place. Thus, if a veteran has a simple claim that does not require a lawyer, he may still use the service representative. This bill does not force the use of attorneys or the courts. Many veterans may not want to use them. They can obtain acceptable results without judicial review or attorneys. For those veterans who feel they need an attorney or who are dissatisfied with the agency's determination, S.11 gives them rights to judicial review and representation by an attorney. These are simple yet fundamental rights. There is no good reason to deny them to veterans.

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April 25, 1988

The Honorable Alan Cranston
Chairman
Committee on Veterans' Affairs
United States Senate
414 Senate Russell Office Building
Washington, DC 20510-6375

Dear Mr. Chairman:

We regret that due to scheduling conflicts, we will be unable to testify at the April 28 hearing on judicial review of Veterans' Affairs determinations. We would like, however, to offer these comments on S. 11 and S. 2292, the two bills upon which the hearing will focus.

The American Bar Association fully supports the principle of judicial review of the decisions of the Administrator of Veterans' Affairs. The ABA believes it is unjustifiable and fundamentally unfair to deny a veteran who has a colorable claim that the VA has exceeded its statutory or constitutional authority his day in court. To make the VA answerable in court to a legitimately-based assertion of unlawful action is to give reality to this nation's continued commitment to equal justice under law and our constitutional system of checks and balances.

The American Bar Association supports S. 11 because it provides for meaningful judicial review. It authorizes court review of final decisions of the Administrator in matters involving claims for benefits under laws administered by the VA. This right to review simply gives an aggrieved veteran the right to petition a court for review; it would not require a court to readjudicate every claim. We believe that this is the essence of judicial review; this is how we protect ourselves from abusive decisions by government officials -- not by requiring courts to review every grievance, which might indeed have a dire impact upon court dockets, but by permitting courts to do so if they think that a preliminary showing of illegality is of sufficient strength.

In contrast, S. 2292 does not allow for court review of any final decision of the Administrator. It only allows a court to review the validity of a regulation promulgated by the Administrator of the VA.

There is a significant body of case law that suggests such court review currently is not precluded by 38 USC 211A and is therefore already available to veterans. We believe that statutory clarification of this right is beneficial, but it alone is insufficient. It does not make the VA answerable in a court of law for any individual decision regarding a veteran's claim for benefits. The aggrieved veteran still will have no meaningful access to the courts. If he or she believes, for example, that the VA did not properly apply the law, or that it acted arbitrarily or capriciously, or that it acted in excess of its statutory authority, the veteran still will have no way of asking a court to review his case. The veteran, for the most part, will be in no better a situation than he or she is right now.

The Council of the ABA Section of Administrative Law, which developed our policy on judicial review for veterans, will be meeting April 29-May 1 and at that time will examine all the provisions of S. 2292. Following their review, we will promptly provide additional views on S. 2292 in a detailed statement for the hearing record.

The American Bar Association appreciates and supports your efforts to provide veterans with meaningful access to the judicial system.

Sincerely,

Robert D. Evans

Robert D. Evans

RDE:saw
6203A

cc: Members, Committee on Veterans' Affairs

THE NON COMMISSIONED OFFICERS ASSOCIATION OF THE UNITED STATES OF AMERICA

"STRENGTH IN UNITY"

STATEMENT OF

Charles R. Jackson
Vice President of Government Affairs

presented to

Committee on Veterans' Affairs
U.S. Senate

on

Judicial Review of Veterans' Claims

April 28, 1988

NATIONAL CAPITAL OFFICE
225 N. Washington Street • Alexandria, VA 22314 • Tele: (703) 549-0311

NCOA

Mr. Chairman, the Non Commissioned Officers Association of the USA (NCOA) representing more than 170,000 active duty, reserve, retired and former noncommissioned and petty officers is grateful for this opportunity to share with the committee its views regarding S.11 and S.2292.

The Veterans Administration Adjudication Procedure and Judicial Review Act, S.11, currently under review by the committee is looked upon by many as the panacea to providing veterans the opportunity to take their case to court. S.2292, the Veterans' Judicial Review Act, is a kind of mini-judicial review which in its efforts to moderate the goals of S.11 may create greater problems. NCOA believes Judicial Review will eventually destroy the non-adversarial review process which currently exists to resolve veterans claims. Nevertheless, both bills contain some good provisions.

S.11

S.11 is divided into five parts, only two of which deal directly with Judicial Review. Parts one and two of the bill seek to codify and clarify in public law the claims, adjudication and rulemaking procedures currently employed by the VA. These sections of the proposal provide the veteran, in law, protection against administrative fiat by the Veterans Administration. Enforcement is gained by judicial review of regulations authorized by Title 5. NCOA has no objection to these parts of the bill. Part five of the bill also is simple. It prescribes effective dates for the measure.

Parts three and four of the bill are a different story. The provisions of part three outline the authority for a veteran to appeal (as a civil action) an adverse determination involving a claim for veterans benefits. Such appeals under the bill would be brought in the United States district court closest to the veteran or in the U.S. District Court in the District of

Columbia.

The bill authorizes Federal courts to decide questions of law and the Constitutionality of pertinent statutes and regulations. Having made such determination the court may uphold or set aside actions of the VA based on presentation of evidence or findings of fact or conclusions of law. The court may compel the administrator or take actions on behalf of the claimant or the court may remand the case to the administrator or Board of Veterans' Appeals for reconsideration. Either the administrator or the claimant may request a remand from from the court. The VA may request a remand to affirm, reverse or supplement its initial decision. The claimant can obtain a remand for the introduction of new evidence.

Naturally, any action of the Federal District Court is subject in the U.S. Court of Appeals and the Supreme Court. And any determination of the court is perpetual, binding upon succeeding administrators and claimants.

However, NCOA believes title two of the measure provides enough substantial additional protection against faulty or unconstitutional regulations to eliminate the need for Judicial Review of individual cases. Title two allows the judicial challenge of regulations promulgated by the VA. NCOA is totally opposed to the provisions of this legislation which will send veterans into the adversarial atmosphere of the Federal court when the Board of Veterans' Appeals has done such an admirable job of providing a nonadversarial environment to achieve the same goal.

The Board of Veterans' Appeals performs its function very much like a court of law. It receives evidence, testimony when appropriate and provides its determination after an objective consideration of the presentation made by both the VA and the veterans and his representative. BVA conducts their fact finding and evidence producing hearings on an informal basis. It is this informality which provides the veteran an undeniable advantage in his appeal.

Another important consideration in the passage of Judicial Review legislation is the reaction of the BVA. Such reaction could come in three forms: 1) The BVA could continue to review cases and decide them objectively as they have in the past: 2) The thought of later review by the court may cause leniency in BVA decisions; 3) The BVA may deny "close-call" claims on the basis that they will be subject to review. Either of the latter two reactions would be undesirable.

The remand or reconsideration provisions of S.11 do little more than codify current BVA practices. Veterans who are able to produce new evidence are granted a second look by the BVA. This practice would not be affected by the bill even if the veterans claim was denied by a Federal court but it would substantially increase the burden of all parties involved.

U.S. district courts throughout this nation are overburdened with both civil and criminal actions. NCOA has grave reservations about the ability of the court to be responsive to veterans needs. The courts lack a frame of reference in veterans issues and the traditional relationships between the veteran and the VA. Additionally it would not be unfair to say that the courts lack the expertise and understanding to deal with most veterans issues. And, those who believe timely consideration of cases is lacking at BVA will be even more sadly disappointed in their attempts to get a case through court. Moreover, because of the number of district courts, uniformity in decisions will suffer tremendously.

S.2292

S.2292 is a four part bill, the meat of which is contained in sections three and four. Similar to S.11, this bill subjects VA rulemaking to the administrative procedures of Title 5 of the United States Code. NCOA has no objection to this provision. Nor does NCOA object to the judicial review of regulations as provided for in Chapter Seven of Title Five [5 U.S.C. & 701 et seq). While not specifically provided in S.11, such judicial review of regulations is implicit in Section 201 of the bill. The only substantial difference between the measures under consideration is S.2292 provides that such reviews be conducted in the U.S. Court of Appeals vice District Courts. As a result, faster resolution might be expected.

This bill approaches judicial review on a substantially different tack than S.11. Rather than allow actions in District Courts, it seeks to limit review to challenges of rules and regulations exclusive of individual case determinations. Such challenges could be pressed in Circuit Courts of Appeal.

To lay the groundwork for such a review the bill then goes on to reorganize the Board of Veterans' Appeals into a virtually independent and superior agency to the VA. S.2292 would vest BVA with the power of non-judicial review over VA rules and regulations. NCOA is sincerely sympathetic to the motivation but strongly objects to these provisions.

There is not another agency in government whose operations are subject to the kind of review authority proposed for the BVA in this bill. NCOA agrees with efforts to make the BVA more independent, but does not agree with granting it additional and unprecedented powers of review over the VA. Such an action would be clearly inconsistent with on-going efforts to elevate the VA to Cabinet status and would seriously jeopardize the ability of the VA to act independently.

ALTERNATIVE

NCOA is steadfast in its opposition to judicial review but the Association is not blind to the possibility of its passage. Thus if our arguments against Judicial Review are not compelling, then the Association urges a different approach to providing judicial review. The Association suggests the creation of a Court of Veterans' Appeals, existing as an independent and well focused judicial body similar to the Court of Military Appeals. Such a court would be more capable of developing the special talent needed to provide uniformity in decisions and timeliness of case consideration while at the same time it would provide protection to veterans against unscrupulous or incompentent lawyers.

Yet even the creation of a special court may not mitigate the greatest damage to the veteran which may arise from the expense involved in pursuing an appeal through the court. This brings us to the issue of attorney fees.

ATTORNEY FEES

Since 1862 veterans have been protected from unscrupulous lawyers in their dealings with the VA by provisions in public law which limits attorney fees to $10.00. Both bills under review by the committee advocate modification of this limit.

Under S.11 attorneys pleading cases before the BVA would be entitled to a fee negotiated with the veteran that does not exceed $500. This limitation may be wavied by the administrator at his discretion. The administrator will also be granted the authority to provide for inflation increases.

Cases which are taken to court would entitle attorneys to fees not exceeding 25 percent of back payments or a fee decided by the court. We presume an attorney could begin a case at the regional level of $10, later earn $500 at the BVA appeal and presumably 25 percent of any court award.

S.2292 also retains the $10 fee limit through regional office case consideration and BVA fees of 25 percent of past due benefits up to $500. It also allows the Court to set fees for cases which go that far, but it does limit payments to $750 for losers.

NCOA is not sure, from reading either bill, whether these limitations include attorney expenses incidental to the veteran's case, i.e.: mailing, telephone, reproduction, separate research or travel. Associated charges frequently exceed fees.

During the last twenty years, NCOA has watched the legal profession grow into a field of specialties rivaled only in medicine. Specialization in the legal field has led to an inordinate number of civil suits, personal injury actions, etc. Although this specialization has probably led to better representation it has also led to a very litigous court ordered society.

NCOA fears that the attorney fee provisions of these bills may be the first step toward a legal specialty in the area of veterans claims. This in itself is not necessarily bad, but it will take time for the legal profession to build to the technical proficiency of service officers from veterans organizations. And, this construction will be financed by veterans. But, will it be better?

Perhaps the most eloquent argument against involving attorneys was quoted in the Supreme Courts decision in Walters v. National Association of Radiation rendered on June 28, 1985.

"To be sure, counsel can often perform useful

> functions even in welfare cases or other instances of mass justice: they may bring out facts ignored by or unknown to the authorities, or help to work out satisfactory compromises. But this is only one side of the coin. Under our adversary system the role of counsel is not to advance his client's cause by any ethical means. Within the limits of professional propriety, causing delay and sowing confusion not only are his right but may be his duty. The appearance of counsel for the citizen is likely to lead the government to provide one--or at least to cause the government's representative to act like one. The result may be to turn what might have been a short conference leading to an amicable result into a protracted controversy... These problems concerning counsel and confrontation inevitably bring up the question whether we would not be better to abandon the adversary system in certain areas of mass justice... While such an experiment would be a sharp break with our tradition of adversary process, that tradition, which has come under serious general challenge from a thoughtful and distinguished judge, was not formulated for a situation in which many thousands of hearings must be provided each month." Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1287-1290 (1975).

The Supreme Court also concluded:

> "It is scarcely open to doubt that if claimants were permitted to retain compensated attorneys the day might come when it could be said that an attorney might indeed be necessary to present a claim properly in a system rendered more adversary and more complex by the very presence of lawyer representation. It is only a small step beyond that to the situation in which the claimant who has a factually simple and obviously deserving claims may nonetheless feel impelled to retain an attorney simply because so many other claimants retain attorneys. And this additional complexity will undoubtedly engender greater administrative costs, with the end result being that less government money reaches it intended beneficiaries."

Essentially the court reached the conclusion that veterans service officers fulfilled the need of veterans to be competently represented.

> **"It would take an extraordinary showing of probability of error in the VA's present benefits claim procedures--and the probability that the presence of attorneys would sharply diminish that possibility--to warrant a holding that the fee limitation denies claimants due process of law . . . the evidence before the District Court as to the success rates in claims handled with or without lawyers shows no such great disparity as to warrant the inference that the fee limitation violates the Due Process Clause of the Fifth Amendment."**

In rendering its decision on the Constitutionality of attorney fee limitations the Supreme Court also reviewed the claims process. Indeed, it not only found the fee to be Constitutional but also concluded the process to be desirable. The Court in its opinion also commended the claims system as an alternative to thousands of civil cases in a system which was not designed to handle such issues. We agree. NCOA is therefore opposed to the fee increase proposal.

NCOA commends the committee for their continued dedication to veterans. However, NCOA must continue to oppose these initiatives.

Thank you.

-end-

Office of the National Commander

**JEWISH WAR VETERANS
OF THE
UNITED STATES OF AMERICA, INC.**

Chartered by an Act of Congress

0388205NL
March 30, 1988

The Honorable Alan Cranston
Chairman, Senate Veterans' Affairs Committee
414 Russell Senate Office Building
Washington, DC 20510

Dear Senator Cranston:

This is in response to a request by Ms. Elizabeth Buechler of your staff for the position of the Jewish War Veterans on Judicial Review. Our position is attached. JWV emphasizes that our number one legislative priority is cabinet status for the Veterans Administration. The Jewish War Veterans now strongly supports S. 533. Of special significance to JWV is that S. 533 be reported without any amendments or riders, specifically Judicial Review. Although, JWV is in favor of the concept of Judicial Review we believe that both Cabinet Level status and Judicial Review should be judged independently and each on their own merits.

Sincerely,

Jack Litz
National Commander

JL:lmr

National Headquarters • 1811 R Street, N.W. • Washington, D.C. 20009-1659 • (202) 265-6280

JUDICIAL REVIEW OF VA DECISIONS

The Jewish War Veterans of the U.S.A. restates its support of legislation to subject Veterans Administration decisions to review by district courts.

The Veterans Administration, through the Board of Veteran Appeals (BVA), acts as final judge, jury and appeals court in veterans' claims cases. This situation is unfair and should be changed. Veterans, like all other American citizens should have access to U.S. District Courts.

Opponents of judicial review claim that the current system would become adversarial instead of being an advocate for veterans. However, in the first three quarters of 1986, the BVA reviewed 31,783 claims and rejected or remanded 27,406 or 86.3% of those. For those 27,406 individuals there is no additional recourse to the law except another appeal to the BVA. In these situations, the BVA becomes an adversary.

Both opponents and proponents of Judicial Review also claim the VA adjudication system as currently constructed works well and is predisposed towards the Veteran. The J.W.V. concurs with this viewpoint, but believes also that veterans should have access to judicial review. The VA has an enormous number of cases to decide upon and in such a vast, complex, organization mistakes will inevitably occur.

Consequently, we favor legislation that does not significantly damage the B.V.A. system of adjudication, while at the same time provides the veterans the inalienable right of due process. The veteran should file an appeal on a case only after going through the BVA system. Furthermore, all VA disability compensation ratings will remain under authority of the VA and could not be changed by a district court. If the district court should find a B.V.A. decision not to be in accordance with the law, then the court's reversal should be remanded to the V.A. for action. The B.V.A. must work with the district courts in providing necessary information pertaining to an individual's case, and keep a file on cases that would establish a system of legal precedence within the B.V.A.

Another concern of the JWV is the ten-dollar limit on lawyers fees as set when an appeals cases appears before the B.V.A. This antiquated fee has effectively limited the legalization of the VA adjudication system, but is a disturbing contradiction when one realizes that the VA has a team of salaried lawyers to sue veterans who allegedly owe the VA money because of overpayments. In fact, in 1985 the number of veterans sued by the VA (45,820) surpassed the number of claims that the BVA reviewed (45,273). Beyond the initial B.V.A. appeal veterans should be entitled to reasonable attorney fees and any legislation should include pre-determined fee levels so as to protect the veteran.

We believe it is critical that the American veteran receive the same constitutional rights granted to all other U.S. citizens. The Senate has acknowledged this fact by passing this legislation in the past. We call upon the 100th Congress to enact this legislation allowing veterans the right to appeal VA decisions to the U.S. court system.

STATEMENT

JERRY L. MASHAW
WILLIAM NELSON CROMWELL PROFESSOR OF LAW
YALE UNIVERSITY

HEARINGS ON S.11

BEFORE

SENATE VETERANS AFFAIRS COMMITTEE

April 21, 1988

Mr. Chairman and Members of the Committee. I am Jerry L. Mashaw, Professor of Law at the Yale Law School. I have been a professor of administrative law for twenty years and have taken a particular interest in federal social welfare programs. I have done extensive study of the Social Security disability claims. My testimony is concerned exclusively with those portions of S.11 that provide for judicial review of decisions on Veterans' claims and for the payment of attorneys fees from past due benefits.

Introduction

Judicial review is an important part of our American heritage. We are accustomed to treat it as self-evidently a good thing. Judicial review conjures up images of the judiciary's leading role in the mid-twentieth century campaign for civil rights and of its critical function in the Watergate affair. We have been taught to imagine judicial review as a major bulwark against governmental oppression and abuses of official power. In many ways this is an important truth; a truth that causes many to view the unavailability of judicial review to any disappointed claimant for veterans' benefits as little short of a national disgrace.

The major point of my testimony to the Committee is to invite you to consider carefully another truth: we pay a cost for judicial review of administrative action. That cost is measured not just in administrative delay, attorneys' fees and court budgets, but also in the effect that judicial review may have on the dynamics and culture of adjudication at the Veterans' Administration. And because these costs are real, we must be careful lest those costs outweigh the benefits.

I, therefore, want to take a clear-eyed look at the benefits and costs of judicial review in the Veteran's Administration context. I am suspicious that the costs outweigh the benefits. And I believe that most of the costs will be paid by veterans themselves. Hence, while there are surely problems with Veteran's Administrative procedures, I do not think that many of those problems will be solved by S.11; and I am fearful that the overall system of adjudication of veterans benefits will be made worse by its adoption.

The Potential Benefits of Judicial Review

The potential benefits of judicial review are of at least five sorts: (1) Correction of administrative errors of judgment; (2) Correction of administrative errors of interpretation; (3) Prevention of procedural unfairness; (4) "Democratization", or "opening up", of the administrative process; and (5) The legitimation of administrative determinations. I have little confidence that S.11 will produce any of these five benefits, save for some marginal increase in the perceived legitimacy of VA claims determinations. Let me briefly elaborate my reasons for these beliefs.

Correction of Agency Errors in Judgment

There is, to my knowledge, no good evidence that the Veteran's Administration process is error prone in ways that disadvantage veterans. The VA makes awards in a very high percentage of its claims compared with other cash benefits agencies. Indeed, apparently because of its attempts to give veterans "the benefit of the doubt" and to process claims expeditiously, the VA must bring a very large number of proceedings each year to recover benefits erroneously paid. I know of no knowledgeable observer who believes that errors at the VA in claims adjudication are systematically biased against making an award. Most would surely claim the opposite.

The contemporary criticisms of the VA decision process are actually criticisms of VA policy (Agent Orange and radiation claims) and of the inconsistency of different panels within the Bureau of Veteran's Appeals. These policy issues really raise issues of interpretation, rather than questions of erroneous judgment, and we shall turn to the subject shortly. The issue of BVA inconsistency across panels is more closely analogous to a claim of erroneous judgment. But we must be careful here. Inconsistency is not necessarily evidence of error. My best guess, based on my studies at SSA, is that these inconsistencies are the result of differences in judgment on marginal questions of application of law-to-fact. And if that is the "problem", then it is not one that has any prospect of amelioration by judicial review. Those sorts of judgmental issues will either be left untouched by judicial review, or we will simply substitute inconsistency across district and circuit courts for inconsistencies within the BVA. If more rigorous consistency is desirable at the Board level, there may well be many ways to address this question by modifying the Board's organization, procedures or substantive standards. But judicial review is not one of them.

Correction of Errors in Interpretation

There is no reason to believe that federal judges will be better at interpreting the Veteran's Administration's statute than is the Veteran's Administration, or at correcting the VA's interpretive errors than is the Congress. Unhappily, there is also no reason to believe that the courts will be less willing to invade the Veteran's Administration's policy responsibilities under the guise of interpreting its statute than have federal courts reviewing the Social Security Administration, Federal Communication Commission or the National Labor and Relations Board.

It is obviously important to have judicial review in those instances in which courts may be superior interpreters -- where agencies are alleged to have violated the Constitution, to have strayed outside their jurisdictions, or are required to apply some more general statute to their usual activities. But it is unlikely that any of these situations are excluded from review by the current provisions of Section 211(a). And, if they are, review can be provided by a provision much more narrowly drafted than S.11.

Prevention of Procedural Unfairness

Review of serious procedural irregularity is now available under the Federal Due Process Clause pursuant to Johnson v. Robison.

Democratization

The notion that the VA process is a "closed" one because of the unavailability of judicial review strikes me as very peculiar. The VA operates in the context of continuous congressional oversight and massive case work. It is permeable on a daily and individual basis by service organizations and state agencies who represent veterans. Indeed, given the integration of service reps into the ordinary operations of the VA adjudicative process, I would describe it as the most open bureaucracy in the United States that administers a massive benefits program.

Legitimacy

It is undeniably the case that our ideological commitment to judicial review causes such review to make a contribution to the legitimation of administrative determinations. In general, we feel better knowing that judicial review is available. In the case of the Veteran's Administration, however, I believe that the legitimation function of judicial review of any and all claims is being vastly oversold. The remedy does not fit the perceived problem.

To the extent that the atomic veterans or those concerned with Agent Orange claims have a dispute with the Veteran's Administration, and therefore, question the legitimacy of its judgments, their dispute is really one of policy or statutory interpretation. These are issues that are being or have been addressed by the Congress and with respect to which generally available judicial review would be largely, if not wholly, irrelevant.

The Potential Costs of Judicial Review

The first cost and one that will be paid by veteran claimants, is the cost of defensiveness and formality induced by judicial review. I do not wish to overstate the degree to which these problems will arise, and to some extent they can be avoided. Nevertheless, there is a simple dynamic to judicial review which almost necessarily produces defensiveness and formality in administrators.

First, the potential generosity of judges (the appeals system is a one-way process that can only increase the level of grants) is very likely to cause some retrenchment either legislatively or administratively on program liberality. This has certainly been the experience in the Social Security Administration and, in an era of continuously tightening budgetary pressures, there is no reason to imagine that the VA will be immune. This is a large, complex and dynamic system. It has many, many points at which minor alterations can limit to some degree the liberality of claims adjudication. A Congress and an Administrator faced with continuous expansion by judicial review and continuous demands by Congress and the Office of Management and Budget to take budgetary affairs seriously, will almost necessarily respond by utilizing some of its multiple opportunities for reducing expenditure.

Even more importantly, the Administration will necessarily pay much more attention to defensive record building under a system of judicial review. This defensiveness obviously interferes with the VA's pro-claimant orientation. The dynamics of judicial review put pressures on the courts, which put pressures on the U.S. attorneys, which put pressures on the General Council's Office at the VA, which results ultimately in greater attention to defensive record building throughout the adjudicatory process. Indeed, the progressive logic of formalization has already begun with the procedural and record requirements included in S.11 itself. Private attorney participation in VA proceedings, always looking toward possible judicial appeals, will reinforce this tendency toward formal record building.

There is no reason to believe that attention to formal record building will benefit claimants. To the extent that this drains resources away from assisting the veteran in building the case, or creates a psychology of implicit adversariness, the systemic affects will be detrimental to the veteran's interests.

Equally importantly, the insertion of attorneys into the VA process may significantly curtail the "target efficiency" of VA expenditures. In more ordinary terms, a lot of money meant for veterans will end up with attorneys. This is, I think, a serious problem. The system of payments established by S.11 provides extremely perverse incentives for attorney representatives. An attorney acting as a rational profit maximizer in response to this bill would accept a high volume of veterans' claims, would attempt to cream from those available to him or her the more attractive ones (rejecting representation in the others) and then make little effort to develop the case for presentation to the Veteran's Administration.

The reasons for this perverse behavior are quite straightforward. An attorney looking at the contribution of attorney representation to claimant success will notice that claimants having no representation at all do very nearly as well as claimants being represented by attorneys. Hence, very significant effort on the part of the attorney may produce no increase or a very minimal increase in the claimant's chances of success. The attorney should, therefore, take as many claims as possible (provided they seem reasonably attractive) and wait for a decision giving the usual 10% - 12% of his clients a victory. The only economically rational activity that the attorney might take would be to delay claims. This would mean that past due benefits would increase, so that if there were a victory on subsequent judicial review, an attorney having the claim on contingency would be entitled to a larger fee.

I hasten to add that I am not predicting that all or many attorneys will behave this way. Only that the bill provides incentives for this sort of behavior and that, at the margin, some attorneys will so behave. This would, of course, be a modest price to pay if there were some reason to believe that attorney activity would be generally beneficial to veterans. But in the context of massive representation of veterans by experienced and expert service representatives, I find it hard to imagine why there should be any significant contribution by attorneys. My experience in observing over one hundred Social Security Disability hearings, in four different regions of the country, is that attorneys make a modest, if any, contribution to the successful disposition of a claim.

Conclusion

I am mindful that there are particular issues which have generated both the current concern about VA claims processing and the current level of support for judicial review of Veteran's Administration adjudications. These are real and vexing problems of national policy. But the Congress has addressed and is addressing these problems outside the boundaries of S.11. In short, the particular issues which have generated the current sense of unease are just that -- particular issues. They do not justify a move toward general judicial review of Veteran's Administration claims. That sort of review must be justified by an overall appreciation of the costs and benefits of introducing judicial review and attorney representation into the Veteran's Administration system. My own analysis of those costs and benefits leads me to fear that, particularly for veterans, S.11 will be a bad bargain.

Thank you.

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February 9, 1988

Honorable Alan Cranston
Chairman, Committee on Veterans' Affairs
112 Senate Hart Office Building
Washington, D.C. 20510-0501

Dear Senator Cranston:

At our recent meeting, the National Association of Attorneys General adopted the enclosed resolution in support of judicial review of final decisions of the Veterans Administration and legal representation for veterans in pursuing their claims. Under present law, a veteran cannot sue the Veterans Administration to obtain a wrongfully denied benefit, and is limited to $10.00 in attorney's fees. Yet the right to contest the decision of a governmental agency, and the right to effective counsel in seeking legal redress, are fundamental democratic rights enjoyed by virtually all U.S. citizens. The veterans who are denied these rights are the very individuals who have fought to preserve these freedoms in our country. The Association supports proposals to lift these restrictions, believing it to be an issue of fundamental fairness to guarantee due process for all Americans.

If we can assist you in any way with your consideration of this matter, I hope you or your staff will contact me or my Deputy, Lynne Ross.

With best personal regards, and

Sincerely,

Christine T. Milliken

cc: Attorney General Neil Hartigan

Submitted by Attorney General Neil Hartigan

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Winter Meeting
December 10-13, 1987
San Diego, California

XVIII

RESOLUTION

VETERANS' RIGHT TO JUDICIAL REVIEW AND LEGAL REPRESENTATION

WHEREAS, veterans have served in the Armed Forces of this nation at great risk to themselves, with many suffering injury of incurring illness as a result of their service; and

WHEREAS, the Veterans' Administration, the nation's largest bureaucracy, is entrusted to provide certain benefits to veterans owed by reason of their service; and

WHEREAS, the final decisions of the Veterans Administration rating and denying various benefit claims are not subject to judicial review; and

WHEREAS, veterans are effectively denied the right to representation by counsel by a statutory limit of $10 on the amount a claimant before the Veterans' Administration can pay an attorney for representation; and

WHEREAS, judicial review and representation by counsel are rights enjoyed by virtually every U.S. resident or special interest group in this nation; and

WHEREAS, the lack of independent review of decisions of the Veterans Administration and the effective denial of legal representation before the agency offend fundamental principles of Due Process.

NOW, THEREFORE, BE IT RESOLVED that the National Association of Attorneys General:

1) Supports judicial review of final decisions of the Veterans Administration; and

2) Supports the right of legal representation before the Veterans Administration; and

3) Authorizes the Executive Director to transmit these views to the appropriate members of the Administration and the Congress and to other interested associations and individuals.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 26, 1988

Honorable Alan Cranston
Chairman
Committee on Veterans' Affairs
United States Senate
Washington, D.C. 20510-6375

Dear Mr. Chairman:

The Department of Justice appreciates very much the opportunity to present its views on S. 11 and S. 2292, two alternative proposals to create a right of judicial review for veterans' benefits. The Justice Department has been involved in the debate over the question of establishing a right of judicial review over veterans' benefits for several years. For example, on June 25, 1986, the Department of Justice presented testimony expressing the same concerns about the wisdom of such judicial review before the House Committee on Veterans Affairs, which then was considering a predecessor judicial review bill, H.R. 585. Our concern with insuring the fairness of our government benefit programs is tempered by an equivalent concern over the impact of creating a new right of judicial review on the functioning of federal courts and over the ability of veterans to have their claims fairly and expeditiously resolved if subjected to the judicial process. A careful balancing of these two interests leads us to oppose proposals for judicial review of veterans' benefits decisions. We believe that, ultimately, the interests of veterans are not served by superimposing on the present system a right to appeal to our now tremendously overcrowded courts. Appeal to the courts is not the only or simplest way to insure justice. Rather, a carefully designed administrative system can preserve and protect all the rights provided by law to our veterans.

We will not, in this statement, address at length the fairness of the present administrative system, or a point by point analysis of the substantive provisions of the two bills now before the Committee. These are subjects better addressed by the Veterans Administration. Instead, we will discuss our general concerns with judicial review as illustrated by certain features of the two bills. We note, first, however, that in the discussion of this issue over the years, no sponsor of such legislation has alleged that the present system results in widespread injustice. The Senate Committee Report to a predecessor bill, S. 330 in the 96th Congress, noted:

> The decision to introduce S. 330 in the 96th Congress and to continue committee consideration of judicial review legislation was not based on a belief that the current system, resulting in a final, unappealable decision being made by the Board of Veterans' Appeals, results in wide-spread injustices; to the contrary, there is no evidence that most claimants are not satisfied with the resolution of their claims for VA benefits.

S. Rep. No. 96-178, 96th Cong., 1st Sess., May 15, 1979, pp. 23-24. See also S. Rep. No. 97-466, 97th Cong., 2nd Sess. (1982); 133 Cong. Rec. S223 (daily ed. Jan. 6, 1987) (remarks of Senator Cranston, acknowledging that Board of Veterans Appeals panel members "make a conscientious effort to carry out their responsibilities in an evenhanded fashion and that, by and large, most claimants before the VA are treated fairly."); 134 Cong. Rec. S4189 (daily ed. April 18, 1988)(remarks of Senator Murkowski).

Judicial review of veterans' benefits decisions has always been precluded. Decatur v. Paulding, 14 Peters 497, 10 L. Ed. 559, (U.S. Supreme Court 1840.) This preclusion was codified in 1933. Act of March 23, 1933, Ch. 3, 9 Stat 48. Congress has repeatedly re-enacted the limitation on judicial review. It has, indeed broadened the original language in response to attempts by the courts to narrow this restriction on their review of veterans' benefits decisions. For example, in 1970 Congress broadened the restriction reaffirming the reasoning behind it. See Pub. L. No. 91-1166, 91st Congress, 2nd Session, 1970 U.S. Code Congressional and Administrative News, 3723, 3729, 3739.

This statutory preclusion of judicial review has historically been supported by two policy arguments which continue to be valid. As articulated by the Supreme Court in Johnson v. Robison, 415 U.S. 361, 370 (1974), these policies are, first to insure that veterans' benefits claims will not burden the courts and the Veterans Administration with expensive and time-consuming litigation and secondly, to insure that the technical and complex determinations of Veterans Administration policy connected with veterans' benefits decisions will be adequately and uniformly made. Perhaps even more importantly, to these reasons might be added the desire to prevent the present informal, nonadversarial procedures -- weighted in favor of the claimant -- from becoming excessively formal, more adversarial and more expensive for both the claimant and the veterans' program budget.

The first reason offered in support of this restriction is, if anything, more important now than when Johnson was decided. As the courts become increasingly overloaded, the delivery of justice becomes slower and the quality of the decision-making process declines. Particularly in light of the continued budget crisis, which has forced the curtailment of many programs, it is difficult to justify imposing substantial additional costs on the taxpayer for what may be at best a marginal improvement in the quality of decision making of veterans' claims.

The case load burden has led to assembly-line procedures for disposing of cases, particularly small, routine government benefit cases such as these. It has not allowed enough time for reflection or mastery of records. In 1975, Circuit Judge Duniway lamented that he and many of his brothers and sisters on the court "are no longer able to give to the cases that ought to have careful attention the time and attention which they deserve".

The Veterans Administration has estimated that the Board of Veterans Appeals, the last step in the administrative review process, hears approximately 41,500 appeals a year. Of these, approximately 70% are denied. It would not be unreasonable to expect up to 20% of those denials would be appealed, adding approximately 5800 new cases a year to the Federal courts. An immediate need for additional federal judges--eleven, according to the estimate of the Judicial Conference--would be an undoubted corollary.

This would come at a time when our leading judicial authorities are decrying the impact of an overcrowded docket on the quality of justice delivered by our courts and are encouraging the development of alternate dispute resolution mechanisms outside the judicial system. The Veterans Administration already has such an alternate dispute resolution mechanism. Veterans' benefit disputes are resolved, for the most part, outside of the courts, in a less formal, nonadversarial process which keeps down the transaction costs of the benefits decisions. It is our view that this should remain the case.

Veterans' benefits determinations are not the only type of administrative determination not subject to judicial review. In the area of government benefits, for example, review is precluded under the Federal Employees Compensation Act, 5 U.S.C. § 8128(b). There is no judicial review provided for certain Medicare determinations. U.S. v. Erika, 456 U.S. 201 (1982). Of course, the Constitution does not require judicial review of benefits decisions, DeRodulfa v. United States, 461 F.2d 1240 (D.C. Cir. 1974), and the present administrative scheme does permit court review of allegations of unconstitutionality.

Likewise, the constitutionality of 38 U.S.C. § 211(a), the statute precluding court jurisdiction over veterans' benefit claims, has been consistently upheld in the courts, and we are unaware of any due process guarantee that mandates a right to judicial review. Rather, our research confirms the continued viability of the principle that Congress, when it creates rights in individuals against the Government, is under no obligation to provide a judicial remedy. It may instead establish only an administrative remedy, provided fundamental due process requirements are met.

The VA program's assumption that an agency will address veteran's claims, seeking their best interests with a minimum of procedural formality (and minimal transaction costs in the form of attorneys fees), is clearly different from those that govern many other programs. Moreover, as a distinguished professor of administrative law at Yale Law School has noted, the VA system has "managed to maintain an acceptable level of satisfaction with its process without significant use of oral hearings, without employing independent ALJ's, and without subjecting its judgments to judicial review." J. Mashaw, Bureaucratic Justice at 142 (1983).

In addition to the added burden placed on the courts, you should be aware that the Justice Department as well as the Veterans Administration would require enhanced resources to handle the increase in litigation resulting from judicial review of veterans' benefits determinations. In 1978, the Justice Department told the Senate Veterans' Affairs Committee that 21 attorneys and 24 clerical positions would be required to handle the then estimated 4,600 cases that it was predicted would arise under the bill under consideration at that time. S. Rep. No. 96-178, 96th Cong., 1st Sess. 13. Based on current salary rates, we estimate that the cost to the Department would exceed $2,600,000.

If we set aside the issue of cost, however, we must consider whether the proposal to create judicial review of veterans' benefits determinations will somehow enhance the justice accorded veterans. It is our view that this will not happen. The federal courts do not always unerringly discern Congress's intended interpretation of a legislative scheme. Moreover, additional layers of judicial review can create inconsistencies, the resolution of which requires still further judicial activity and increased costs for the claimant, the government, and the judiciary. This conception of the courts as the sole institutional repository of fairness has lead to a judicial system which is suffering from severe overload. To save the judicial system -- and to save the veterans' benefits program from the costs, the delays and the burdens of review by non-specialist judges across the country -- this program should be kept under a purely administrative system.

Our views of S. 11 and S. 2292 reflect these concerns about the impact of judicial review on the VA's nonadversarial system. For example, S. 11 would authorize district court review of both regulations and individual claims determinations by the BVA, and would subject those determinations to review that would include not only an inquiry into whether the BVA erred in applying the law, but also an inquiry into the validity of its factfinding. S. 11 also would authorize claimants and their counsel very broad rights of discovery in the administrative process, thus jeopardizing the current nonadversarial system and increasing the costs of resolving these claims. S. 11 apparently would authorize district courts, in their "discretion," to require remand of decisions back to the BVA, thereby introducing further delay and uncertainty into this process.

S. 2292, although more limited in scope, similarly subjects to judicial review any claims determinations where the claimant challenges VA "regulations" (a term broadly defined to include "statements of general policy and "interpretations of general applicability" -- types of agency action which are not subject to judicial review). While we cannot predict how S. 2292 would be interpreted in practice, claimants arguably could assert that they are entitled to judicial review in any case in which it would be illegal for the regulation to be applied to their situation. S. 2292 also purports to authorize a unique (and subjective) standard of review of regulations, i.e., regulations can be set aside if "resting upon a policy judgment, reasoning or factual premise so unacceptable as to render the regulation arbitrary." Accordingly, the bills under consideration by the Committee exemplify the problems inherent in judicial review of VA claims.

Thank you for the opportunity to express these views.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Jack E. Perkins for

Thomas M. Boyd
Acting Assistant Attorney General

STATEMENT OF LUCIUS SMITH III
EXECUTIVE DIRECTOR
NATIONAL ASSOCIATION OF ATOMIC VETERANS
BEFORE THE
SENATE COMMITTEE ON VETERANS' AFFAIRS
APRIL 21, 1988

Mr. Chairman and Members of the Committee:
It is my pleasure to present the interim views of the National Association of Atomic Veterans at this hearing on S.11, the proposed "Veterans' Administration Adjudication Procedure and Judicial Review Act," introduced by the distinguished Chairman of this Committee with the co-sponsorship of Senators Simpson, Matsunaga, DeConcini, Mitchell, Rockefeller, Stafford, Kennedy, Cohen, Chiles, Durenberger, Gore, Pressler, Sasser, Heinz, Kerry, Wilson, Simon, Leahy, Levin, Sarbanes, Riegle, Melcher, Johnston, Burdick and Bingaman.

S. 11 would establish certain procedures for the adjudication of claims for benefits under laws administered by the VA, as well as provide for judicial review of certain final decisions of the Administrator, and provide for the payment of reasonable fees to attorneys representing veterans in the circumstances ... among other things.

Chairman Cranston's long-standing motive for pressing forward yet again with basic judicial review legislation endures: "I continue to propose this legislation," he states, " to provide access to justice for veterans as a matter of fundamental fairness."

Atomic veterans wholeheartedly agree with that sentiment, as what veteran does not. The dilemma facing those of us asked to comment or recommend on behalf of atomic veterans, at this time and on this issue, is simply this:

- As of April 18, the Atomic Veteran was still on the outside, looking in, the VA's carefully-crafted structure for dispensing disability and death benefits.
- To date, the VA has rejected over 99 percent of all service radiation-related filings for compensation.

Gentlemen, when your side strikes out 99 of every 100 times at bat, it isn't the umpire you go after. It's the commissioners of the game ... and the rule book!

Simply put: until the President signs into law new rules for the VA to adjudicate -- when the claim is presented by a veteran whose time in service exposed him to cancers -- it is premature for this association to attempt to recommend on judicial review.

Moreover, we note the polarization over this issue that has arisen -- as between the Senate and House, even within their respective Committees, and extending to the national service organizations. Then, too, there is the new dimension posed by the forthcoming debate over raising the VA to Cabinet status.

In the absence of a legislative remedy, to date; in the presence of this polarization, the National Association of Atomic Veterans begs leave to waive the Chairman's invitation to testify in depth at this time.

In so stating, however, we are not retiring from the field. For the Atomic Veteran, justice must begin with fundamental right to go before the VA as service connected petitioners. In the first instance.

Once we have achieved a level playing field there will be ample occasion to debate judicial review ... as it effects radiation-exposure accountability. I close this brief statement with appreciation for this opportunity once again to be heard.

This concludes my prepared statement.

WRITTEN QUESTIONS FROM CHAIRMAN CRANSTON TO JUDGE ARNOLD AND JUDGE BREYER AND THE RESPONSES

1. **Would you each please give us a short summary of your experience and familiarity with the V.A. adjudication and/or the V.A. system as a whole?**

   Judge Arnold: My experience as a Federal judge, dealing with agency determinations and a member of the Judicial Conference Committee on Federal-State Jurisdiction are the most relevant experience. In addition, I have been a law professor, Associate Dean of the University of Pennsylvania Law School and Dean of the Indiana University Law School.

   Judge Breyer: The only relevant experience I have in this area comes from my experience as a Federal judge and a teacher of administrative law.

2. **Would you please give us a brief description of the advantages and disadvantages of having review under S. 11 at the District Court versus the Appeals Court level.**

   Judge Arnold: Whether in the district court or in the court of appeals, judicial review under S. 11 would be time-consuming and expensive, not only to the court, but also to the veteran; and such review would lack uniformity. District courts, however, are more accustomed to fact-finding and requests for attorneys' fees and, pursuant to 28 U.S.C. §636, may refer benefit cases to United States Magistrates as is done with Social Security cases.

   Judge Breyer: The district court is more able to make the factual determinations needed to award attorneys' fees under the proposed bills. To place review in the courts of appeals would likely save one extra level of review.

3. **S. 2292 would allow the Board of Veterans Appeals to rule on the validity of regulations promulgated by the Administrator and on the correctness of General Counsel opinions. This provision runs counter to the Administrative Conference of the United States recommendation that in any legislative bifurcation of rulemaking and adjudicatory responsibility, as in the**

V.A., the adjudicatory body should accept the policy agency's interpretation of a standard unless it could be shown that the rulemaking agency's interpretation is arbitrary, capricious or otherwise not in accordance with law. Do you agree with the Administrative Conference on this point?

Judge Arnold: I would defer to Judge Breyer on this question.

Judge Breyer: In my testimony I referred to several drafting problems in S. 2292. They are rather technical problems reflecting 'administrative law' concerns. This question raises another such problem. I would answer the question as follows: administrative law principles favor instructing courts to give weight to the factfinding of the adjudicative body, and to the rulemaking judgments of those parts of the agency that are more expert in making rules. Where these functions are split (as in the case of OSHA), courts have held that, while OSHRC (the factfinder) is entitled to adjudicative deference, the Secretary of Labor (the rulemaker) is entitled to deference in respect to the meaning of the rule. See Donovan v. A. Amorello & Sons, Inc., 761 F.2d 61 (1st Cir. 1985).

I will also briefly mention here the other technical problems I found in S. 2292:

1. S. 2292's definition of "rule" seems drawn from 'ripeness' cases. It might be preferable to leave "rule" undefined (or to cross-reference the Administrative Procedure Act) rather than to create a new linguistic standard for courts to interpret.

2. S. 2292 says that a court will determine the meaning of an agency's rule. This is contrary to ordinary administrative law principles which require a court to defer to an agency's interpretation of its own rules. See Bowles v. Seminole Rock Co., 325 U.S. 410, 413-14 (1945).

3. The bill's standard of review is simply "arbitrary" rather than the more ordinary "arbitrary, capricious, abuse of discretion". It may be preferable (and would produce uniformity) simply to cross-reference the relevant part of the APA.

4. The bill requires a Court of Appeals to set attorney's fees. It is difficult for Courts of Appeals to resolve any contested issues involved in

matters of this sort, as those courts lack factfinding procedures.

5. The bill requires a court to award legal fees even where the attorney loses, adjusted by the probability of his winning. Any court, but particularly a Court of Appeals, would have difficulty making the judgments needed to apply this standard. The standard, as also found in S. 11, threatens to create considerable time-consuming, complex attorneys' fees litigation, without much offsetting benefit.

6. S. 2292 requires the agency to use "notice and comment" procedures in areas ("loans, grants, benefits") now specifically exempted from 5 U.S.C. 553's "notice and comment" provisions. Why should this agency alone follow this procedure in this normally exempt area, and only in the exempt area?

4. **Do you believe that currently under section 211(a), a veteran or other claimant is permitted to challenge in a court of law, on both constitutional and statutory grounds, a regulation promulgated by the V.A. or the V.A.'s interpretation of such a regulation?**

Judge Arnold: I would prefer not to comment, as such a case might come before me in the future.

Judge Breyer: What I know about this question can be found in S. Breyer and R. Stewart, Administrative law and Regulatory Policy, 1059-63; 1074-80 (2d ed. 1985). I have attached this for your information.

5. **In your written testimony, you suggest that if judicial review of an adverse decision on an individual's claim for benefits is "absolutely necessary", jurisdiction for that review should either remain with the Board of Veterans Appeals or should be conferred upon a new Article one court.**

   A. **Do you believe that there would be sufficient work load to keep a newly created Article I court busy?**

   B. **Would you please share with us in writing your calculations, and the results thereof, which reveal how many cases would be reviewed should S. 11 be enacted into law?**

A. Judge Arnold: Yes. Of course, this would depend upon the size of the court. The size of the court should be determined by formula. For the district court, for example, the weighted caseload per district judge is 400 cases. The only courts in existence similar to an Article I Veterans' Court are the U.S. Tax Court, which hears only tax cases with review in the courts of appeals, and the U.S. Claims Court, which, among other things, currently hears benefit cases as a result of the Childhood Vaccine Injury Act with appeals in the Court of Appeals for the Federal Circuit. A formula similar to that of these two courts would be appropriate to fix the number of judges in accordance with the workload.

Judge Breyer: It depends upon what other matters might be included in that court's work.

B. Judge Arnold: Our estimates are based on figures provided by the Board of Veterans Appeals (BVA) and our experience with social security cases. The BVA estimates that they will decide 32,500 cases annually. They estimate that they will deny 70 percent of the 32,500 cases or 22,750 cases. Based on the social security experience, 20 percent of the BVA denials will be appealed to the district court or 4,550 cases, which would go into the Federal judicial system nationwide. If the BVA adds additional members, the BVA then estimates that they may be able to decide as many as 46,000 annually. They again estimate that they will deny 70 percent of the 46,000 cases or 32,200 cases. Based again on the social security experience, 20 percent of the BVA denials will be appealed to the district court or 6,440 cases, which would go into the Federal judicial system nationwide. I caution, however, that these are very conservative estimates.

Administrative Law and Regulatory Policy

Problems, Text, and Cases

Second Edition

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By §693h it provided for review by the Army Review Board of the exercise of such authority. Surely these two provisions must be given an harmonious reading to the end that the basis on which the Secretary's action is reviewed is coterminous with the basis on which he is allowed to act. Section 693h expressly requires that the findings of the Army Review Board "shall be based upon all available records of the [Army] relating to the person requesting such review. . . ." We think the word "records," as used in the statute, means *records of military service*, and that the statute, properly construed, means that the type of discharge to be issued is to be determined solely by the soldier's military record in the Army. . . .

The judgments of the Court of Appeals are reversed and the cases are remanded to the District Court for the relief to which petitioners are entitled in the light of this opinion.

Reversed.

Mr. Justice CLARK, dissenting.

. . . Throughout our history the function of granting discharge certificates has been entrusted by the Congress to the President and, through him, to the respective Secretaries of the Armed Forces. At no time until today have the courts interfered in the exercise of this military function. The lack of any judicial review is evidenced by the fact that for over 70 years Congress itself reviewed military discharges and frequently enacted private bills directing the appropriate Secretary to correct the type of discharge certificate given. By legislation in 1944 and 1946, Congress authorized creation of administrative boards to which it transferred the review of military discharges in an effort to conserve its own time. That legislation makes no provision for judicial review; on the contrary, the 1944 Act expressly states that the findings of the Army Discharge Review Board shall be "final subject only to review by the Secretary of [the Army]," and the 1946 Act, as amended in 1951, expressly provides that the determination of the Board to Correct Military Records shall be "final and conclusive on all officers of the Government except when procured by means of fraud." . . .

The courts' tendency to interpret statutes that apparently preclude review or otherwise restrict its availability to allow review nonetheless is well illustrated in immigration cases. Consider Shaughnessy v. Pedreiro, 349 U.S. 48 (1955). Pedreiro was ordered deported by the Attorney General. The 1952 Immigrations Act made the Attorney General's decisions "final." The Supreme Court had held that the word "final" in the prior 1971 Immigration Act meant that review was available through habeas corpus and not otherwise.[93] Despite the earlier decision, the Court here held that the word "final" in the 1952 Act referred "to finality in administrative procedure" not to "cutting off the right of judicial review in whole or in part," for Congress would not have required "a person ordered deported to go to jail in order to obtain review by a court."[94] Thus, review in an action for declaratory and injunctive relief was proper.

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[93] Heikkila v. Barber, 345 U.S. 229 (1953).

When matters less important than citizenship are at stake, the courts have interpreted "finality" clauses less favorably to plaintiffs.[95] But Congress still has had to make its intent to preclude review very specific to be effective. In the Veterans Benefits Act, for example, Congress wrote tha "the decisions of the Administrator on any question of law or fact co cerning a claim for benefits or payments under any law administered the Veterans Administration shall be final and conclusive and no oth official or any court of the United States shall have power or jurisdic to review any such decision." 72 Stat. 1115 (1958).

This section was read to preclude review[96] until the D.C. Cir held that since the statute used the words "claim for benefits," it did apply to administrative action *terminating benefits* correctly paid to plaintiff.[97] Congress responded by amending the statute to read: "[T decisions of the Administrator on any question of law or fact under law administered by the Veterans Administration providing benefit veterans and their dependants or survivors shall be final and conclu and no other official or any court shall have power or jurisdictio review any such decision by an action in the nature of mandamu otherwise." 38 U.S.C. §211(a) (1970).

What could be more clear?[98] Yet, consider the next case.

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[94] 349 U.S. at 51. See also Rusk v. Cort, 369 U.S. 367 (1962), in which the allowed an American nonresident, who had been refused a passport on the ground had lost his citizenship by avoiding the draft, to obtain review in a declaratory jud action, despite a statute that apparently required such persons to travel to the United and obtain a ruling about citizenship from the Attorney General. The statute provide "a final determination by the Attorney General" of inadmissibility "shall be subject to by any court of competent jurisdiction in habeas corpus proceedings and not other U.S.C. §1053(c). This language, according to the Court, was not meant to preclude of the question of citizenship in a declaratory judgment action. For a further int discussion of the review of immigration and citizenship questions, see Note, Depo and Exclusion: A Continuing Dialogue Between Congress and the Courts, 71 Yale L (1962). See also Foti v. Immigration Service, 375 U.S. 217 (1963). Compare D Schweiker, 700 F.2d 865 (2d Cir. 1983).

[95] See Note, Judicial Review of Federal Administrative Decisions Concerning ties, 49 Va. L. Rev. 313 (1963). Sometimes, of course, words like "shall not be revie any court" are taken to mean what they say. Williams v. Pierce, 708 F.2d 53 (2d Cir

[96] See Barefield v. Byrd, 320 F.2d 455 (5th Cir. 1963); Davis, Veterans Judicial Review, and the Constitutional Problems of "Positive" Government, 39 I 183 (1964).

[97] See, e.g., Tracy v. Gleason, 379 F.2d 469 (D.C. Cir. 1967).

[98] De Rodulfa v. United States, 461 F.2d 1240 (D.C. Cir.) *cert. denied*, 409 U (1972) (no review of the Administrator's award of counsel fees). Compare a Circuit C Appeals decision to review the lawfulness of a compensation award despite langua relevant statute making the decision reviewed "final and conclusive for all purposes standing any other provisions of law to the contrary and not subject to review." R Bell, 569 F.2d 607 (D.C. Cir. 1977).

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Johnson v. Robison

415 U.S. 361 (1974)

Mr. Justice Brennan delivered the opinion of the Court:

[Plaintiff, a conscientious objector who served required alternative ilian service, applied for Veterans Benefits and was turned down by the lministrator, for the statute provided benefits only for veterans of mili- y service. The Administrator rejected plaintiff's claim that as so inter- eted, the statute was unconstitutional. The Court first decided that the cision of the Administrator denying benefits was reviewable.]

. . . We consider first appellant's contention that section 211(a) bars leral courts from deciding the constitutionality of veterans' benefits gislation. Such a construction would, of course, raise serious questions ncerning the constitutionality of §211(a)[99] and in such case "it is a dinal principle that this Court will first ascertain whether a construc- n of the statute is fairly possible by which the [constitutional] ques- n[s] may be avoided." . . .

Plainly, no explicit provision of §211(a) bars judicial consideration of pellee's constitutional claims. That section provides that "the *decisions* the Administrator on any question of law or fact *under* any law admin- red by the Veterans' Administration providing benefits for veterans . shall be final and conclusive and no . . . court of the United States ll have power or jurisdiction to review any such decision. . . ." (Em- sis added.) The prohibitions would appear to be aimed at review only hose decisions of law or fact that arise in the *administration* by the erans' Administration of a *statute* providing benefits for veterans. A ision of law or fact "under" a statute is made by the Administrator in interpretation or application of a particular provision of the statute to articular set of facts. Appellee's constitutional challenge is not to any h decision of the *Administrator*, but rather to a decision of *Congress* to ate a statutory class entitled to benefits that does not include I-O scientious objectors who performed alternative civilian service. Thus, he District Court stated: "The questions of law presented in these ceedings arise under the Constitution, not under the statute whose dity is challenged." . . .

Nor does the legislative history accompanying the 1970 amendment 11(a) demonstrate a congressional intention to bar judicial review n of constitutional questions. No-review clauses similar to §211(a) e been a part of veterans' benefits legislation since 1933. While the

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[99] Compare Ex parte McCardle, 7 Wall. 506 (1869); Sheldon v. Sill, 8 How. 441 (1850), Martin v. Hunter's Lessee, 1 Wheat. 304 (1816); St. Joseph Stock Yards Co. v. United s, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring). See Hart, The Power of Congress to the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362

legislative history accompanying these precursor no-review clauses is
most nonexistent, the Administrator, in a letter written in 1952 in co
nection with a revision of the clause under consideration by t
Subcommittee of the House Committee on Veterans' Affairs, comp
hensively explained the policies necessitating the no-review clause a
identified two primary purposes: (1) to insure the veterans' benefits clai
will not burden the courts and the Veterans' Administration with expe
sive and time-consuming litigation, and (2) to insure that the technic
and complex determinations and applications of Veterans' Administ
tion policy connected with veterans' benefits decisions will be adequate
and uniformly made.

The legislative history of the 1970 amendment indicates nothin
more than a congressional intent to preserve these two primary purpose
Before amendment, the no-review clause made final "the decisions of t
Administrator on any question of law or fact *concerning a claim for ben*
fits or payments under [certain] law[s] administered by the Veterans' A
ministration" (emphasis added). . . . In a series of decisions . . . th
Court of Appeals for the District of Columbia Circuit interpreted th
term "claim" as a limitation upon the reach of §211(a), and as a conse
quence held that judicial review of actions by the Administrator *subs*
quent to an original grant of benefits was not barred.

Congress perceived this judicial interpretation as a threat to the du
purposes of the no-review clause. First, the interpretation would lead t
an inevitable increase in litigation with consequent burdens upon th
courts and the Veterans' Administration. . . .

Second, Congress was concerned that the judicial interpretation c
§211(a) would involve the courts in day-to-day determination and inter
pretation of Veterans' Administration policy. . . .

Thus, the 1970 amendment was enacted to overrule the interpreta
tion of the Court of Appeals for the District of Columbia Circuit, and
thereby restore vitality to the two primary purposes to be served by the
no-review clause. Nothing whatever in the legislative history of the 197
amendment, or predecessor no-review clauses, suggests any congres
sional intent to preclude judicial cognizance of constitutional challenge
to veterans' benefits legislation. Such challenges obviously do not contra
vene the purposes of the no-review clause, for they cannot be expected t
burden the courts by their volume, nor do they involve technical considerations of Veterans' Administration policy. We therefore conclude, in
agreement with the District Court, that a construction of §211(a) that
does not extend the prohibitions of that section to actions challenging the
constitutionality of laws providing benefits for veterans is not only "fairly
possible" but is the most reasonable construction, for neither the text nor
the scant legislative history of §211(a) provides the "clear and convincing" evidence of congressional intent required by this Court before

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statute will be construed to restrict access to judicial review. See Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967).

3. *"Committed to Agency Discretion"*

APA §706 states that a reviewing court "shall . . . hold unlawful and set aside agency action . . . found to be . . . an abuse of discretion. . . ." But §10(a)(2), 5 U.S.C. §701(a)(2), says that the whole chapter, including 10(a), does *not* apply to "agency action . . . committed to agency discretion by law." Does this exception mean that there is a class of matters as to which an agency *can* abuse its discretion, and that there is no redress available in a court of law, even though there is no statute precluding review?

Raoul Berger argues that §701(a)(2) excepts from the review provisions only *lawful* exercise of discretion. Any *abuse* of discretion would be reviewable unless a statute precludes review.[100] One might need such a section in the APA to remind courts that agencies enjoy very broad discretionary authority — authority that can extend into the area of "lawmaking" itself. Without the section, courts might too often set aside agency actions that, for example, might involve decisions of law, even though the action represents a lawful exercise of agency discretion. At this point, review the materials on "question of law" at pp. 257-289 supra, to remind yourself how potentially broad is the realm in which the agency can exercise discretion free of court interference. In the Berger view, then, in the absence of a *statute* precluding review, whenever an agency exceeds these bounds, or balances factors unreasonably in a given case, or (under the "hard look" approach developed with respect to review of discretion in recent years) fails adequately to support or explain its discretion, a court should stand ready to intervene.

Professor Jaffe comes close to supporting the Berger view when he argues that the discretionary powers granted agencies always have limits, and a court should stand ready to intervene when those limits are overstepped. He writes, "A power may appear to be granted in absolute terms and [its] . . . character . . . [or] statutory history . . . may support the apparent implication. . . . But such an interpretation of a statute should be tolerated only on a very strong showing. This is not to be taken as a plea for judicial interference with discretion; the argument is rather that the presence of discretion should not bar a court from considering a claim of illegal or arbitrary use of discretion. . . . The upshot is that there making all a matter of "congressional intent." The cases you have read, however, suggest that §701(a)(2)'s exception may have a somewhat broader scope, focusing on the "practical and policy implications of reviewability." See, Local 1219, American Fed. of Govt. Employees v. Donovan, 683 F.2d 511, 515 (D.C. Cir. 1982). These factors[120] may, of course, "evidence" Congress's "reviewability" intentions in the particular statutory scheme. Perhaps it thus makes little difference whether one puts the "nonreviewability" decision in the "(a)(1)" or the "(a)(2)" box. See National Assn. of Postal Supervisors v. United States Postal Service, 602 F.2d 420, 432 (D.C. Cir. 1979).

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[100] Berger, Administrative Arbitrariness and Judicial Review, 65 Colum. L. Rev. 55 (1965). See, e.g., Commonwealth of Va. ex rel. Commn. v. Marshall, 599 F.2d 588, 592 (4th Cir. 1979).

5. In practice, in deciding whether to review, courts take a variety of factors into account, balancing individual, agency, and judicial interests. As the opinions in *Hahn* and *Langevin* suggest, they take into account such factors as the nature and importance of the interests of the parties, the complexity of the issues, and the obviousness of the violations of law. At this point, it will prove helpful to review the factors determining the scope of agency discretion considered in the sections on review of fact and review of law, Chapter 4, since these factors are obviously related to those used to determine the scope of the "committed to agency discretion" exception.

4. The Constitutionality of Preclusion of Review

The Court in *Robison* stated that its finding of reviewability helped to avoid a constitutional question. That question is whether, or when, Congress can constitutionally curtail a right to judicial review. The question was discussed in Crowell v. Benson, supra, in which Justice Brandeis suggested that "under certain circumstances, the constitutional requirement of due process is a requirement of judicial process." When does "due process" include judicial review? Or, put another way, to what extent can Congress constitutionally preclude judicial review of a decision of a government official? This question is considered at length in Bator, Mishkin, Shapiro & Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 330-375 (2d ed. 1973). We refer you to that discussion. The subject is a difficult and intricate one, which we shall only summarize briefly here.

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[120] Professor Saferstein lists the following factors as among those the courts will consider: (1) broad agency discretion, (2) expertise and experience needed to understand the relevant area, (3) managerial nature of the agency, (4) impropriety of judicial intervention, (5) need for informal decisionmaking, (6) inability of the court to insure a later correct agency decision, (7) need for expeditious operation of the agency program, (8) number of potentially appealable actions, (9) existence of other ways to deal with abuse of discretion. H. Saferstein, Nonreviewability: A Functional Analysis of "Committed to Agency Discretion," 82 Harv. L. Rev. 367 (1968).

In the case of preclusion of review by federal courts, the problem is founded on Article III, Section 1, of the Constitution, which states that the "judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." This section suggests that Congress *may*, but need not, establish lower federal courts. The Supreme Court in Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850), accepted this view and went on to hold that Congress can restrict the jurisdiction of the lower federal courts; it need not grant them full power to hear all federal question cases, "diversity cases," or other sorts of cases that Article III lists as within the scope of the federal judicial power. This view was consistent with the position of those who saw Article III as a compromise between those who wanted a strong centralizing federal judicial system and those who feared such a system would strip the state courts of their general jurisdiction, which included jurisdiction over federal questions. Under that compromise Congress would decide the extent to which lower federal courts were needed.[121]

Although Article III may give Congress power to limit the jurisdiction of the federal courts, one might ask whether the exercise of that power could, in a given instance, violate the Due Process Clause. Might it, in depriving a litigant of judicial review, say of a claim that a governmental action was unconstitutional, deprive him or her of life, liberty, or property without due process of law?

This question is the subject of Professor Hart's famous dialogue on the power of Congress to limit the jurisdiction of the federal courts.[122] It is a most important discussion for our purposes; it focuses on an act of Congress that would foreclose the federal courts from hearing a claim that the government has denied a litigant an important constitutional right — a claim, for example, that it has deprived him of free speech or his liberty. Professor Hart concludes that as long as *some* judicial forum — state or federal — is available to test the legality of the claim, Congress can constitutionally foreclose access to other forums. If, for example, all federal courts were denied jurisdiction to hear a particular claim (say, that a litigant was denied free speech), that litigant might raise the claim in a state court, and review of that decision could eventually be sought in the Supreme Court. Under these circumstances, the Act of Congress limiting or foreclosing access to the federal courts in the first instance would be constitutional. So also may Congress impose reasonable restrictions on the right to review within the federal court system. For example, it may ordinarily direct that review be brought in a specified forum, that a petition to review be filed within 30 days after the challenged agency decision, and so forth.[123]

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[121] For a contrary view, that Congress was obliged to endow the lower federal courts with the full scope of Article III's powers, see Martin v. Hunter's Lessee, 1 Wheat. 304 (1816) (Story, J.); Eisenberg, Congressional Authority to Restrict Lower Federal Court Jurisdiction, 83 Yale L.J. 498 (1974).

[122] Bator, Mishkin, Shapiro & Wechsler, op. cit. note 44, at 330.

But suppose that Congress were to enact a statute precluding all review of a particular claim that a federal action was unlawful or unconstitutional. The constitutionality of such an act might depend on several factors, such as the importance of the underlying right of which the litigant was arguably deprived, the government interest in precluding review, and the extent to which the courts are already involved in the litigant's case.

Professor Hart argues that the constitutional problems raised by preclusion of review are especially acute when the courts are asked by the government to enforce coercive orders against persons who claim that the orders are unlawful. Consider Crowell v. Benson, supra. In that case, a litigant invoked the court's jurisdiction to obtain a court order transferring to him property (money) belonging to his employer. Under those circumstances, both the Court and Justice Brandeis indicated that some federal court review, at the behest of the employer, of the legal merits of the claim was constitutionally compelled by due process (and, the Court added, by Article III as well).[124] But would the Court or Justice Brandeis have reached the same conclusion had the case involved a government benefit to a claimant rather than a coercive order against an individual's property? Consider, in this respect the relevance of the decisions in Chapter 7 with respect to due process hearing rights. If a person is entitled to some form of administrative hearing where "liberty" or "property" is at stake, should he or she not also be entitled to judicial review, not only to ensure agency conformance with due process requirements, but also to determine whether the agency unlawfully deprived that person of "liberty" or "property" in the given circumstances?

To what extent do the answers to these questions depend on the particular type of illegality asserted by the person seeking review? As already noted, p. 1074, supra, claims may run the gamut from a constitutional violation to abuse of discretion to factual error.

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[123] In Yakus v. United States, 321 U.S. 414 (1944), for example, the Court held that Congress could constitutionally prohibit courts in a criminal prosecution brought under the price control act from considering arguments that the act or regulations issued under it were unconstitutional. However, provision was made for opportunity to raise constitutional issues by judicial challenge to regulations or rent orders, in a Temporary Emergency Court of Appeals prior to prosecution.

[124] Do you believe that the court in *Hahn* or in *Langevin* would have refused to review the lawfulness (i.e., the reasonableness) of the rent increases if the court's jurisdiction had been invoked by the defendants in order to enforce the increase? Suppose the landlords had sought judicial help in collecting rent or evicting the tenants for nonpayment. Would the courts have enforced the rent increase order without inquiring into the lawfulness of the rent it contained? Certainly Crowell v. Benson, which Judge Friendly cited, suggests not. (Marbury v. Madison does too, doesn't it?) But would that review of lawfulness have included a review of the reasonableness of the rent? One cannot easily invoke a court's jurisdiction to enforce an order and at the same time argue that the court is precluded from reviewing the legality of the order to be enforced.

The courts have not dealt explicitly with the doctrine of a constitutional right to judicial review, nor have they defined its contours. They approached the question tangentially, however, in a series of selective service cases involving the issue of *when* review must take place. In Falbo v. United States, 320 U.S. 549 (1944), the Supreme Court held that a person drafted by his selective service board could not raise questions concerning the legality of his draft classification until *after* he was inducted; he could raise such issues only as a defense in a criminal trial (for refusing induction) or in a habeas corpus proceeding (after induction). In Wolff v. Selective Service Local Board No. 16, 372 F.2d 817 (2d Cir. 1967), however, the Court of Appeals enjoined a draft board from inducting plaintiffs. The court accepted plaintiffs' argument that the board was retaliating against plaintiffs' antiwar demonstration; hence the induction violated First Amendment rights, and for that reason a preinduction injunction was proper. Congress responded to *Wolff* by enacting a statute explicitly depriving the courts of power to review "the classification or processing of any registrant . . . except as a defense to a criminal prosecution" after induction.[125] 50 U.S.C. App. §460(b)(3). The Supreme Court, interpreting that statute in Oestereich v. Selective Service System Local Board No. 11, 393 U.S. 233 (1968), held that it did *not* prevent a court from issuing a preinduction injunction barring the board from drafting a divinity student who had protested against the war. The Court argued that another part of the statute specifically exempts full-time ministry students from the draft; since the exemption is "plain and unequivocal," and since the board's action was clearly wrong, "pre-induction judicial review is not precluded . . ." by the statute. 393 U.S. at 238, 239.

Justice Harlan, concurring, wrote that a failure to interpret the statute to allow him review would deprive petitioner of his liberty "without the prior opportunity to present to any competent forum — agency or court — his substantial claim. . . . Such an interpretation [of the statute] . . . would raise serious constitutional problems." 393 U.S. at 243. Justice Harlan then wrote the following footnote: "It is doubtful whether a person may be deprived of his personal liberty without the prior opportunity to be heard by some tribunal competent fully to adjudicate his claims. . . . [citing, among other cases, Londoner v. Denver, 210 U.S. 373, 385 (1908), with "But cf." citations to North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908), and Bowles v. Willingham, 321 U.S. 503, 520 (1944).]" He asserted that the validity of summary administrative deprivation of liberty without a full hearing may turn on the availability of a prompt subsequent hearing, "something not made meaningfully available to petitioner here, either by the option of defending a criminal prosecution for refusing to report for induction . . . or by filing a petition for a writ of habeas corpus after induction. . . . [If petitioner's argument that the board is punishing him by drafting him is correct,] then postponement of a hearing until after induction is tantamount to permitting the imposition of summary punishment, followed by loss of liberty, without possibility of bail, until [habeas corpus can be secured]." Justice Stewart, responding to Justice Harlan, pointed out that persons arrested for criminal offenses are frequently deprived of their liberty prior to a full hearing. 393 U.S. at 250, n.10.

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[125] This statute was not intended to deprive those drafted of the right to seek habeas corpus.

The reach of *Oestereich* was limited by Clark v. Gabriel, 393 U.S. 256 (1968), which held that preinduction review was not proper where plaintiffs' claims to deferment raised issues which were not plain and unequivocal. A majority of the Court held that there was no constitutional objection to this interpretation of the statute. A few weeks after deciding *Clark*, the Court applied it to reject a request for preinduction review of plaintiffs' attack on student deferments based on equal protection grounds. Again, presumably, the Constitution raised no obstacle to postponing review of this constitutional question until after induction.[126]

Questions

1. Did the governing statute in *McAnnulty* provide for judicial review? If not, what is the basis for court review of the Postmaster General's action?

2. Why did the *Switchmen* Court refuse to review the National Mediation Board's decision? Suppose that the Railroad had sided with the Switchmen instead of with the Board and the Brotherhood, and suppose it had refused to bargain with the Brotherhood. Suppose further that the Brotherhood had brought an action in equity asking for enforcement of the Board's certificate. Would the Court, before issuing the order, have examined the lawfulness of the Board's order?

3. Examine the two exceptions written into APA §701. Is the exception for "agency action committed to agency discretion by law" in fact an exception? Why does it not just mean that agency action that is lawful (because it does not abuse agency discretion) will not be set aside by a court?

4. Do *Goldberg*, *Roth*, and other due process hearing cases imply that judicial review is sometimes required by due process? If so, under what circumstances ~~is~~ review constitutionally mandated and what is the required scope of review?

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[126] See also Breen v. Selective Service System Local Board No. 16, 396 U.S. 460 (1970) (following *Oestereich* to allow preinduction review); Fein v. Selective Service System Local Board No. 7, 405 U.S. 365 (1972) (following *Gabriel* to deny preinduction review). See generally, Donahue, The Supreme Court v. Section 10(b)(3) of the Selective Service Act: A Study in Ducking Constitutional Issues, 17 U.C.L.A.L. Rev. 908 (1970).

Problems

1. John Smith was a conscientious objector during the Vietnam war. He spent two years of alternative service in a public hospital, after which he enrolled as a student at State University. In July 1974 he read that the federal courts had interpreted the relevant statutes to require that veterans' educational benefits must be made available to conscientious objectors as well as to armed forces veterans. He telephoned the Veterans' Administration in Washington and asked how to apply for benefits for the following school year. He was told, by a Mr. Jones, that he could apply by letter, which should reach the VA on or before August 31. As he hung up the phone he thought he heard a voice say, "That'll teach the little pacifist fink," but he thought no more of it until his application for benefits were returned with a form which stated that all applications had to reach the VA by July 31.

Smith appealed to the VA for reconsideration, but he was told that no late application would be considered regardless of the reason for delay. Smith now wishes to ask for court review of this decision. The relevant statute states, "All decisions made by the Veterans Administration as to the awarding of veterans benefits or any related benefit or as to any question of fact or law related to any such benefit are final and no such decision nor any related question, whether of fact or of law, shall be reviewed in any way in any court."

What arguments for review might Smith make?

2. Since the beginning of the Republic, statutory provisions in the military draft have existed recognizing the special status of conscientious objectors. Despite this consistent policy, there has never been any statutory protection afforded those who become conscientious objectors after entering the armed services. In 1962, however, the Secretary of Defense issued a directive that "bona fide conscientious objection by persons who are members of the Armed Forces will be recognized to the extent practicable and equitable." Pursuant to this directive, each of the services has promulgated regulations applicable to such persons.

The relevant provisions of the Department of Defense Directive and the Navy Department's regulations may be briefly summarized.[127] A member of the service who seeks discharge on the ground that he has become a conscientious objector since he entered the service must file a discharge request containing substantial personal information and, if possible, supporting statements from others. The applicant is then to be interviewed by his commanding officer, who forwards a recommendation to the Chief of Naval Personnel. The Chief of Naval Personnel is required to refer each application to the head of the Selective Service System for an "advisory opinion," and to give the opinion great weight. The regulations do not provide for any opportunity to be heard other than in the application and in the interview with the commanding officer. It is further provided by the directive and in the regulations that "[d]etermination of a request for discharge is committed to the discretion of the department, and such determination shall be final and binding and not subject to further review in any tribunal with respect to the administrative separation of its members."

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[127] These regulations are roughly, but not precisely, equivalent to those in effect in 1970.

Henry Emerson, then a 17-year-old high school student, enlisted in the Naval Reserve in 1966 and has been a participating member of the active reserves ever since. He was not called for active duty. In June, 1970, he became a member of a pacifist organization and in December, 1970, he submitted a request for discharge on the ground of conscientious objection. After the prescribed interview, the commanding officer concluded that Emerson was sincere in his convictions and recommended discharge. The case was then forwarded to the head of the Selective Service System for an advisory opinion, and the opinion given without further explanation was that: "Based on the information in his file, it is my opinion that Henry Emerson would not be classified as a conscientious objector if he were being considered for induction at this time."

Emerson's request was denied without explanation, and he was ordered to continue attending drills in accordance with his reserve obligation. When he refused, he was ordered to report for active duty on January 1, 1971. Emerson has just filed, in the federal district court of his residence, a petition for a writ of habeas corpus on the ground that the denial of his conscientious objector status was "without basis in fact," and that the decision violated his rights under the First and Fifth Amendments. The Government has moved to dismiss the writ on the ground that the decision of the Navy is not subject to judicial review.

How should the Court rule on the motion? Should the disposition of the motion turn on whether there is merit to Emerson's claim of a *constitutional* right to be discharged?

D. Standing to Secure Judicial Review

1. *Introductory Note*

In addition to establishing that administrative action is reviewable, a litigant challenging such action must also satisfy requirements of standing that limit the class of persons entitled to secure judicial review. As developed below, American administrative law has traditionally restricted

THE AMERICAN UNIVERSITY
WASHINGTON, DC

May 19, 1988

The Honorable Alan Cranston
United States Senate
Committee on Veterans' Affairs
Room 414, Russell Senate Office Building
Washington, D.C. 20510-6375

Re: Answers to Supplemental Questions
(Committee Hearings, April 28, 1988)

Dear Senator Cranston:

Thank you for your supplemental questions of April 29. My answers to your questions will be relatively brief, because I tried to make my prepared testimony fairly exhaustive. If questions still remain, please do not hesitate to call.

1. You asked whether, in light of our experience in representing claimants before the BVA, we feel that the Board is qualified to or should be empowered to rule on the validity of VA regulations and of G.C. opinions.Since the Board does not presently exercise that function, we can of course only speculate on the Board's ability to do so. Our sense is that, since federal district courts already exercise jurisdiction over questions of the constitutionality of VA regulations, little purpose would be served in transferring that jurisdiction to the BVA. The Board has no expertise in deciding constitutional questions; there seems to be no point in requiring the Board to acquire such expertise, since it is already clearly well developed in the courts.

As my written submission suggested, in the past we have had reason to question the BVA's application of law to facts, or statements of the law, in a number of cases. Our experiences have led us to have little confidence in the BVA's ability to adjudicate more complicated issues of constitutionality.

Also, as the BVA is presently constituted, there would seem to be a conflict in its interpreting the regulations issued by the office of the Administrator, pursuant to 38 U.S.C.§210(c)(1). By insulating the appointment process for the BVA from the office of the Administrator, S.2292 might offer some greater guarantee of impartiality. However, we believe that the safeguard is far from perfect.

2. You asked what role attorneys should play in representing claimants before the BVA, given the performance of veterans service organizations. I should state that we have had little

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Public Interest Law Clinic (202) 885-1510

4400 Massachusetts Avenue, N.W., Washington, D.C. 20016

generalizable experience with the performance of service organizations. We usually represent claimants at the BVA level, after local attorneys or service representatives have helped claimants with their claims at the local VA Regional Offices. The quality of representation below varies. I cannot say that we have seen claimants' claims seriously compromised by the work of service representatives; I can say that we have seen claims that have been inadequately developed, and can speculate that some of our more complicated claims, which have in fact been handled by attorneys from the beginning, might have been handled with less sophistication by service representations who lacked formal training.

As Eugene Fidell commented at the hearings, service representatives constitute a valuable and much over-worked resource. I do think that the training in discovery, investigation, legal analysis and legal writing which attorneys receive enables them to contribute significantly to the representation of veterans before the BVA. There *is* a difference in the thoroughness of the legal analysis and of the investigation between a file I receive from an attorney in the field, and the type of file I may receive from many service representatives. I think that the severe pressure placed on service representatives to handle large numbers of cases[1] results from the "$10 limit", and has to be inimical to exhaustive and thorough representation. The availability of more attorneys for more veterans should inevitably result in improved quality of advocacy.

3. I have no other comments on questions directed to the other panel members.

Thank you for allowing us to participate in this process. I hope that we will have the opportunity to contribute again in the future.

Respectfully submitted,

Susan D. Bennett
Assistant Professor of Law
Director, Public Interest
Law Clinic

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[1] The BVA's statistics for the second quarter of FY 1988 show, for example, that the American Legion handled 1413 cases before the BVA; the Disabled American Veterans represented 5173 claims.

DAV

Motto: "If I cannot speak good of my comrade, I will not speak ill of him."

DISABLED AMERICAN VETERANS

NATIONAL SERVICE and LEGISLATIVE HEADQUARTERS
807 MAINE AVENUE, S.W.
WASHINGTON, D.C. 20024
(202) 554-3501

May 10, 1988

Honorable Alan Cranston, Chairman
Senate Veterans Affairs Committee
414 Russell Senate Office Building
Washington, DC 20515

Dear Senator Cranston:

In reference to your letter of April 29, 1988, attached are DAV's responses to the follow-up questions posed (Attachment A), as well as our organization's response to the request from Senator DeConcini for information concerning the DAV's National Service Program (Attachment B).

Please incorporate all of the attached material in the record for the Committee's hearing of April 28, 1988 on S. 11 and S. 2292.

Sincerely yours,

John F. Heilman

JOHN F. HEILMAN
National Legislative Director

JFH:lrd
Attachments
cc: Senator Murkowski
    Senator DeConcini

Attachment A

RESPONSE TO FOLLOW-UP QUESTIONS POSED BY SENATOR CRANSTON

Questions 1-A, 1-B and 1-C are obviously generated by the allegation that has been put forth on several occasions by certain proponents of judicial review (as proposed by S. 11 and prior legislation) which, in effect, claims that the major veterans' organizations -- DAV included -- have been threatened by the Veterans Administration with loss of office space and telephones (now provided as a courtesy by VA to VSOs) if they did not oppose judicial review.

Such a "threat" has never been made to the DAV. The source of this so-called "blackmail" is a rather innocuous reference contained in the attached January 5, 1986 communication apparently sent by VA to the various State Departments of Veterans Affairs. In this communication, VA provided an "overview" of its position on judicial review (as proposed by H. R. 585, 99th Congress). On page 5 of this overview, VA stated its concern that, should judicial review be enacted into law, the substantial costs associated with the legislation might necessitate curtailment of the office space and telephone service provided to VSOs. Taken in its proper context, this reference can by no means be construed as "blackmail or as a "threat." Also, since the major veterans' organizations had already been opposing judicial review (as proposed by H.R. 585 and prior legislation) for some seven years, the allegation is seen to contain no substance.

Question 1-A:

Do you have any concern that if judicial review legislation is enacted, your organization will lose the office space and telephones now provided to you free of charge by the VA?

Answer:

The DAV has no concern whatsoever regarding the loss of office space and telephone service now provided by VA, should judicial review, as proposed by S. 11 or S. 2292, be enacted into law. DAV notes that neither bill contains an amendment to 38 U.S.C., Section 3402(a)(2), which authorizes the Administration to provide such space and service.

Question 1-B:

Has the VA ever suggested to your organization that you might lose free space and telephones if judicial review legislation were enacted?

Answer:

As indicated above, the VA mentioned in its communication to State Departments of Veterans Affairs that the cost of judicial review (as proposed by S. 11) could result in curtailment of certain considerations extended to VSOs. We did not then, nor do we now, believe that this would occur -- not because there would be no accompanying cost to the system should S. 11 be enacted into law, but because the work performed by the VSOs in enabling veterans to utilize the VA system clearly "saves" the VA (and the American taxpayer) millions of dollars per year. That is to say, the savings associated with discontinuing office space and telephone considerations for VSOs would be offset, many times over, by the additional FTEE VA would require in order to compensate for the loss of services that VSOs now provide.

Question 1-C:

Please provide an estimate of what would it cost your organization to provide a similar office space and telephone service, if the VA did not provide it?

Answer:

I cannot provide the Committee with an estimate of the cost to our organization should VA discontinue its provision of office space and telephone service. In view of the fact that the DAV presently occupies 67 offices in federal buildings and VA hospitals, clearly the cost would be substantial. However, as stated above, it is in the financial interest of the VA to continue to provide these considerations, for the services performed by our 246 National Service Officers and 150 support (clerical) personnel provide enormous savings to the VA. Finally, in the unlikely event that the VA should revoke these special considerations, I am certain the Congress, acting on the request of the VSOs, would restore them through legislative mandate.

Question 2-A:

I believe that one of the reasons raised by your organization in opposition to judicial review as provided in S. 11 is that it will cause delay in an already drawn-out process, is that correct?

Answer:

Nothing in DAV's statement refers to the current VA claims adjudication process as being "drawn-out." Our view of the likelihood of delay that could be created by the enactment of S. 11 appears below.

Question 2-B:

Since the review provided for in S. 11 does not occur until after the entire VA claims adjudication process is over, what delay are you referring to?

Answer:

DAV makes four references in its testimony to "delay" that may be created by the enactment of S. 11. One reference, on page 15 of our statement, refers to delays in judicial review proceedings that would be authorized by S. 11. Our view of such delays is discussed below. The second reference to delay, in the quote from Chief Judge Friendly on page 25, refers to the delays that lawyers feel duty-bound to cause when they practice before an agency. The other two references to delay on pages 15 and 16 refer chiefly to those delays before the Agency that would be the inevitable consequence of S. 11, given the time-consuming nature of the formalized adjudication procedures that would be introduced by, e.g., Section 108 of the bill. Other witnesses before the Committee echo our concern about the potential for such delay. Yale Law Professor Mashaw refers to the "administrative delay" that judicial review under S. 11 would engender, while VA General Counsel Ivers notes that the presence of such judicial review would alter the nature of the claims process, making it "burdensome and protracted," because of the adversarial environment that would be created at the agency level.

Question 2-C:

Why wouldn't an individual who has already lost his claim with a final denial by the BVA, and who but for judicial review would have no opportunity to be awarded the benefits in question, view the time spent in going to court as an investment in possibly obtaining benefits rather than as a delay?

Answer:

While a disappointed claimant might adopt the view described in the question, it must be noted, as Judges Arnold and Breyer testified on behalf of the Judicial Conference of the United States, that judicial review under S. 11 would be "expensive and fraught with delay." Those witnesses pointed out that Social Security cases, which are subject to similar judicial review, move very slowly through the court system and that "it is not unusual to find an appeal in the court of appeals involving a claim filed five or more years prior to submission of the appeal to a three-judge panel." In the opinion of the witnesses, such delay would be "inevitable" and there is no reason to believe that appeals of adverse VA benefit determinations would move through the courts with any greater speed. Hence, what might appear to be an "investment" could well become an example of frustrating delay. Rather than permit this to happen, it seems to us far better to limit court review to questions of law and to leave factual questions in the hands of an independent Executive Branch body. We note that the correction of an egrigious error of fact that seems to be the concern of the proponents of S. 11 (and treated at proposed Section 4026(a)(1)(D)) can now be accomplished under the reconsideration provisions of 38, C.F.R., Subsection 19.185-19.190. These provisions, coupled with the oversight of individual cases provided by service officers from recognized organizations, and other representatives, reduce to a negligible level the possibility that "obvious" factual errors will remain uncorrected. In addition, such reconsideration can be expected to consume a fraction of the time required for judicial review.

Office of Congressional and Intergovernmental Affairs

Washington DC 2042

Veterans Administration

June 5, 1986

In Reply Refer To:

Mr. Pete Wheeler
Commissioner
Department of Veterans Service
Floyd Veterans Memorial Building
Suite E-970
Atlanta, Georgia 30334

Dear Mr. Wheeler:

In accordance with our desire to maintain close cooperation and liaison with state offices and private agencies serving our nation's veteran community, I am enclosing copies of topical discussion papers recently released by the Veterans Administration which I think will be of immediate interest to you.

Each of these papers address important issues concerning the continued delivery of VA health care, benefits and other services to veterans in the future. The immediate items of discussion and interest are:

1. Consolidated Omnibus Budget Reconciliation Act of 1985 (Public Law 99-272):
    - A. Changes in VA Health Care Eligibility.
    - B. Recovery of Cost of VA Health Care.
2. Judicial Review: An Overview of VA's Position.
3. H.R. 585 (VA Adjudication Procedure and Judicial Review Act): Impact on VA Adjudication Procedures.

As you know, these concerns have all been high-priority issues among the veteran community for many months. We have a continuing obligation to veterans and veteran service officers to insure that our views, guidelines and methods of operation are clearly understood and widely disseminated in as timely a manner as possible. I am sure you will agree that these point papers adequately serve this purpose.

"America is #1—Thanks to our Veterans"

Page 2.

I would very much like to receive your views on these issues, particularly regarding your ideas on the VA positions as enumerated in these enclosures. Your written comments would be greatly appreciated, or you can contact me or Larry De Meo of my staff at (202) 389-5554. We look forward to hearing from you.

Sincerely,

Gail Gompf

GAIL A. GOMPF
Director
Intergovernmental Affairs

Attachment

OVERVIEW OF VA's POSITION ON JUDICIAL REVIEW

The Veterans Administration believes that veterans deserve an efficient, just, and compassionate system of dispute resolution. We understand the philosophic appeal of judicial review, which would grant veterans their "day in court." However, H.R. 585, 99th Congress, would sour the already good system to the detriment of all veterans.

Veterans would derive negligible tangible benefit from access to the courts. Under the existing adjudication system, claims for VA benefits can be reviewed, perhaps on multiple occasions, on two separate administrative levels. Claims receive thorough and careful consideration, and all reasonable doubt is resolved in favor of the claimant. Furthermore, internal quality control programs assure that VA decisionmaking is kept to a high standard of accuracy. We are confident that only in rare instances would a court find a VA decision to be arbitrary or and capricious.

Under current practice, VA assists a claimant in developing evidence favorable to establishing eligibility. If the evidence adduced on the claimant's behalf is sufficient to establish entitlement, the claim is allowed. If not, the claimant is advised that available evidence is insufficient

to establish eligibility in the expert opinion of the reviewing panel, which, with respect to disability claims, includes a medical doctor. Imposition of judicial review poses a real risk that this current focus of our administrative process--assisting claimants establish benefit entitlement--will shift to insuring that VA denials withstand judicial scrutiny.

The bill's supporters have the laudable intention of preserving intact this informal and cooperative system, and simply adding another available remedy. What we believe they have not foreseen, and what is central to our opposition to H.R. 585, is that the current system would inevitably be changed for the worse by the mere availability of judicial review in the U.S. District Courts.

Enactment of judicial review would interject an adversary relationship into what has been a cooperative process. As a matter of principle, VA should never be placed in an adversary posture, much less become an opposing litigant, with respect to claimants. The prospect of court scrutiny and repeated challenges to our pro-veteran process would necessarily result in more rigid and formal procedures.

VA would be thrust into the unaccustomed adversarial role of developing evidence to refute a claimant's contentions in order to assure that the record supports denial of the claim to the satisfaction of a reviewing judge. The Agency would have to document every factor and consideration that led to denial of a claim, that is, "build the record." Each procedural step would have to be recorded, including minor ministerial actions. The professional knowledge of a BVA or Rating Board physician member would have to be set forth in the record in detail and bolstered by additional evidence, such as scientific treatises or journal articles, for the benefit of judges untrained in the medical profession.

This adversarial posture would, conceivably, be most evident in cases in which eligibility turns upon the credibility of a witness, perhaps the claimant himself or herself. If, for whatever reason, VA found the witness' testimony less than persuasive, it could be forced to examine or cross-examine the witness in a manner designed to expose the basis for VA's disbelief. Direct, probing questioning by the rating board or BVA members would be needed to create a "complete" record. This examination, with a view toward withstanding judicial scrutiny, will at a minimum place us in an antagonistic role that renders the process more acrimonious. The assistive relationship with veterans we cur-

rently enjoy would be undermined, and perhaps with it a sense of our mission to help them. In a system so different, no one can forecast with confidence that the attitudes of VA adjudicators, no matter how well-intentioned or trained, will not change as well.

Furthermore, administrative flexibility could be lost. At present, for example, the Agency liberally applies requirements of timeliness, particularity in the filing of appeals, and the proffering of "new and material" evidence to reopen a case. This means the VA often expends extra effort in a host of cases that, technically, do not comply with the rules for obtaining review. With the likely change in our relationship with the veteran after enactment of the bill, increased pressure to handle cases as expeditiously as possible, concern with committing reversible errors in certifying appeals, and the participation of more attorneys, who should be held to a high standard for compliance with such "jurisdictional" rules, the relaxed approach may be expected to change.

The length and formality of personal hearings would increase as more attorneys get involved and as VA is forced to build the record. Hearings may become protracted by extensive briefing, subpoena of treating or consulting physicians, introduction of

circumstantial testimony by friends or family members, and more intensive direct- and cross-examination of witnesses.

Judicial review would also delay the processing of all claims. The perceived need to build the record will require VA to secure additional documentary evidence, time-consuming examinations, and social surveys. The prospect of judicial second-guessing may increase the remanding of cases by the BVA in cases involving only "technical" or otherwise harmless administrative errors. Such delay could reduce the value of awards (future dollars) for successful claimants, and foster demoralization and the perception that the system is unfair.

Moreover, many special considerations currently extended to veterans service organizations may have to be curtailed. The providing of VA space and facilities, informal access to adjudicatory personnel, etc., could be affected by judicial oversight and increased representation by private attorneys.

The uniformity in decisionmaking now provided by relying on a centralized, collegial body like BVA can also be expected to suffer. Vesting review authority in the 94 district courts will result in inconsistent decisions mandated by application of different eligibility and adjudication standards likely to be

developed in the courts. In our view, a veteran's entitlement to benefits is not a matter that varies with geography, and a veteran should not be subjected to a system in which the resolution of a claim may differ depending upon the judicial district in which the veteran resides.

Finally, it should be noted that the participation of attorneys would increase the costs to claimants. The primary purpose of the present limitation on fees is, of course, to preserve a claimant's award of benefits to the maximum extent possible. With modification of the attorney fee provision, attorney participation may be expected to increase, and those who retain counsel will obviously bear a greater expense. For example, liberalization of attorney fee awards in Social Security cases caused lawyer representation to jump from 36.8% in 1977 to 64.2% in 1983.

We are also concerned that such representation would become the norm, regardless of whether a claimant actually needs a lawyer. As the U.S. Supreme Court observed in a recent challenge to the attorney fee limitation:

7.

> It is scarcely open to doubt that if claimants were permitted to retain compensated attorneys the day might come when it could be said that an attorney might indeed be necessary to present a claim properly in a system rendered more adversary and more complex by the very presence of lawyer representation. It is only a small step beyond that to the situation in which the claimant who has a factually simple and obviously deserving claim may nonetheless feel impelled to retain an attorney simply because so many other claimants retain attorneys.

Walters v. National Association of Radiation Survivors, _ U.S. _, 105 S. Ct. 3180, 3192 (1985).

In conclusion, we believe the imposition of judicial review might benefit a few individuals, but it would work to the detriment of the great majority of claimants as it formalizes and delays the processing of claims, and alters the cooperative relationship between veterans and the Agency. Veterans now have a fair and impartial forum. Our procedures afford a full opportunity to present all evidence and have it carefully considered. So uniquely beneficent a system should not be jeopardized for the dubious end of guaranteeing a few unsuccessful claimants the opportunity of having their claims again considered -- and probably denied -- in a court of law.

Attachment B

THE DISABLED AMERICAN VETERANS NATIONAL SERVICE PROGRAM

* The Disabled American Veterans employs approximately 250 National Service Officers in 67 locations across the United States. All DAV NSOs are wartime disabled veterans, of whom about 95 percent are Vietnam veterans. During the one-year reporting period ending June 30, 1987, DAV NSOs conducted more than 224,000 interviews, processed almost 200,000 claims before the VA and won for veteran claimants more than $959 million in annual and retroactive benefits. Veterans need not be members of the DAV to avail themselves of the DAV's free professional assistance.

* The DAV operates a nationwide Field Service Unit Program, for veterans who can't get to VA regional offices or DAV service offices. These office-equipped vans have assisted more than 460,000 veterans and their families in their hometowns since the program's inception in 1974. It continues to assist about 23,000 veterans and dependents annually.

Other programs include:

* The Emergency Relief Fund -- which provides grants to disabled veterans and their families facing financial emergencies. Almost $8 million has been dispensed to 50,000 individuals since the program's inception in 1973.

* The Disaster Relief Fund -- which provides financial assistance to disabled veterans and their families in recovering from the immediate effects of natural disasters. More than $2 million has been disbursed to almost 4,000 claimants since the program's inception in 1968.

* The Older Veterans Assistance Program -- which is a community-based support network of DAV volunteers who work to meet the broad range of needs facing America's older veterans. Currently more than 4,000 registered volunteers are at work assisting older veterans in all 50 states. The National Organization of the DAV, its state departments and local chapters and auxiliary units have committed more than $100,000 to this program.

* The DAV Hospital Service Coordinator Program -- which provides for the placement of a DAV-employed individual in each of the VA's 172 medical facilities around the country. The HSC's job is to advise veteran patients of the full range of assistance available to them, assist those without transportation in getting to doctor and clinic appointments, and provide such other assistance as may be required. Presently, HSCs are in place at 133 VA hospitals. The National Organization has donated 27 vans at a cost of more than $1 million to help meet the transportation needs of veterans, while DAV state departments have spent almost $2 million in support of the program.

* The DAV VA Voluntary Service (VAVS) program -- which coordinates the activities of DAV volunteers at VA medical facilities around the country. In 1987, more than 5,500 DAV VAVS volunteers provided more than 1.2 million hours of volunteer service, while donating more than $500,000 to the medical facilities in which they serve.

* The DAV Scholarship Program -- which assists the children of service-connected disabled veterans whose parents are unable to provide the cost of a college education. Payments of up to $3,000 per student per year are paid directly into the student's college account. Since the program's inception in 1969, the DAV has provided more than $5.9 million in funds for its scholarship program.

* During the calendar year ending December 31, 1986, as reported to the House Judiciary Committee and the Comptroller General of the United States (pursuant to P. L. 88-504), administration of the DAV National Service Program required expenditures of $22,469,274.

PROFILE ON DAV
NATIONAL SERVICE OFFICERS

Total National Service Officers	246
Total Supervisory National Service Officers	64
Total Assistant Supervisory National Service Officers	35
Total Associate National Service Officers	127
Total National Service Officer Trainees	20

Age

Average Age of National Service Officers	42
31 - 40 Years of Age	127
41 - 50 Years of Age	83
51 - 60 Years of Age	29
61 - 67 Years of Age	7

Years of Employment

Average Years of Employment		9.6
0 - 5 Years of Employment	65	(Avg Age 41)
6 - 10 Years of Employment	60	(Avg Age 41)
11 - 15 Years of Employment	97	(Avg Age 42)
16 - 20 Years of Employment	17	(Avg Age 43)
21 - 25 Years of Employment	1	(Avg Age 56)
25 - 30 Years of Employment	1	(Avg Age 56)
31 - 40 Years of Employment	0	
41 Years of Employment	3	(Avg Age 56)
42 Years of Employment	2	(Avg Age 64)

Average Salaries

Supervisory National Service Officer	$ 42,274.70
Assistant Supervisory National Service Officer	38,238.72
Associate National Service Officer	29,386.48
National Service Officer Trainee	18,854.40
All National Service Officers	33,142.71

Military Service

Total World War I National Service Officers	0
Total World War II National Service Officers	10
Total Korean Conflict National Service Officers	27
Total Vietnam War National Service Officers	238

NSOs whose Disabilities are Combat Incurred	136
NSOs whose Disabilities are Not Combat Incurred	110

Total NSOs Formerly in the U.S. Air Force	36
Total NSOs Formerly in the U.S. Army	120
Total NSOs Formerly in the U.S. Marine Corps	58
Total NSOs Formerly in the U.S. Navy	42

Education

Total NSOs who have Associate Degrees	44
Total NSOs who have Bachelor Degrees	49
Total NSOs who have Master Degrees	7
Total NSOs who have PhDs	1

THE BEST GET BETTER — The new training program for DAV National Service Officers combines state-of-the art computer technology with old fashioned classroom work. Find out why some in the VA and government are already saying it sets new standards others should follow.

SEE PAGE 15

July 1987 DAV Magazine

In the beginning, some might say, there were the No. 2 pencil and a Big Chief tablet.

Education has come a long way from those days, a fact underscored by the recent debut of the DAV's training program for National Service Officers (NSOs).

Interactive computer programs, videotaped presentations of course material and other high-tech devices have been combined into what DAV officials are calling "a training program that will ensure our disabled veteran clients receive the best possible assistance available anywhere...and from anyone."

The program, which will be introduced to National Service Office Supervisors later this month, represents the culmination of a three-year effort by National Service Department staff, augmented by NSOs from the field, experts in education and the VA, as well as specialists in audiovisual aids, other technical experts and high government officials.

"We believe the main reason for the DAV's phenomenal growth through the years has been the fact that we've always maintained high technical standards for our NSOs," said Charles E. Joeckel, Jr., executive director of the DAV's Washington Headquarters and the man legally responsible for NSO training. "New technology now permits us to expand those technical standards, and design a continuing, comprehensive training program that is thorough, easy to use and flexible."

The DAV, with more than 65 years of technical experience in the field of veterans' claims representation, concluded "the time was ripe to take our training efforts into a whole new dimension...a dimension made possible by the recent introduction of modern teaching technology," Joeckel said.

Yet even as high tech enters the teaching field, some old teaching tools remain. According to Arthur H. Wilson, National Service Director, the new training program combines the best characteristics of two past approaches to DAV training: institutionalized training at selected sites (such as American and Catholic Universities used by the DAV through the years), and on-the-job training.

"Training must be consistent and it must be practical for our NSOs. To achieve that consistency in the past, we often brought our NSOs together at a common location. That's always been expensive and time-consuming. At the same time, we recognized that NSO training had to include important 'hands-on' experience. Our NSOs must be able to effectively serve DAV clients, and not simply know the regulations," he said. "Our new training program allows us to, in effect, bring the university to the NSO—in his office, on the road or at home. And at the same time, he or she will continue to receive the important on-the-job experience the tasks demand."

The training program was designed for use by rehabilitated DAV NSOs—those who have completed their on-the-job training and acquired significant job related experience.

Bringing all the elements together to make an effective training program was no simple task. "We had to ensure the design of the program was flawless, so we used people with a total of more than 500 years of experience in the business," said Jesse Brown, Deputy National Service Director and the man who coordinated the DAV's development of the training program. "From conception through to execution we used the best talents we could find—from the DAV, the VA, the education and technology fields—in order to ensure the program focused on important aspects we use in our everyday work."

During the early conception stage, the training experts concluded the program must cover four important areas: anatomy, pathology, physiology, and VA laws and regulations. To address these areas, six key elements of the training program were designed: the DAV Supplement to VA Schedule for Rating Disabilities (which quickly became known as the "Super Rating Schedule"), the Supervisor's Training Manual, the National Service Officers' Workbook, video tapes, audio cassettes and interactive computer programs. Each element performs a key function in ensuring the material is learned—and learned well—by the NSO.

- **The DAV Supplement to the VA Schedule for Rating Disabilities**—provides the foundation for the entire training program and serves as a basic reference tool. DAV NSOs have long known the facts they need to do their jobs could only be found in a wide range of different reference materials. That made it tough to quickly and easily lay their hands on those facts. The "Super Rating Schedule" has been designed to bring all these diverse materials together into a single, easy to use volume. The loose-leaf bound volume permits easy updating of materials and incorporates a wealth of resource material that will directly assist the NSO in providing technical representation on a daily basis.

- **The Supervisors' Training Manual**—provides NSO Supervisors with the materials they need to present the training program in their offices. It includes anatomy and physiology illustrations, material for the presentation of lectures, tutorial assistance, questions and answers, as well as case discussions and other issues.

- **Video tapes**—form an integral part of the training program. Operating on the assumption that a picture is worth a thousand words, NSOs will view programs that cover anatomy, physiology and VA laws as they apply to the evaluation of disabilities. The video tapes will be shown in the classroom, but, importantly, they will be made available to NSOs who wish to take them home and view them on their own VCRs.

- **Audio Cassettes**—also serve as important tools for reinforcing lesson materials. Each tape will contain a complete lesson on one training topic. NSOs will be able to listen to them at home, in their cars or anywhere an audio cassette player is available.

- **Interactive Computer Programs**—will allow NSOs to enhance their knowledge of anatomy, physiology and pathology, working at their own pace at computers installed in each of the DAV's National Service Offices.

Everyone knows that a new car is no good unless you drive it. DAV officials say they intend seeing the DAV's new training program gets driven fast and hard, right from the start.

To accomplish this, later this month, three seminars—two in Washington and one in Reno, Nev.—will be held for NSO Supervisors. These "train-a-trainer" seminars will introduce the Supervisors to the training package and teach them how to use it.

The seminars will underscore the fact that NSO Supervisors continue to be responsible for the training of their associates. Now, however, Supervisors have been given a broad variety of tools to help ensure they're able to discharge that responsibility—completely and consistently.

Following these seminars, the Supervisors will go back to their offices and immediately implement the training program.

But before they leave the seminar, they'll be exposed to another important element of the training program's structure: tests.

Early in the program's development, it became apparent that it was important to maintain high competency standards for DAV NSOs and that those standards be measurable if the training program was going to be effective.

To accomplish this, a variety of skill level tests were developed. Before NSOs begins the training program, they are administered a computer-based, pre-test designed to measure their current level of expertise and identify areas where additional training is necessary.

The test is conducted via computer phone link between the NSO's computer terminal in the office and the mainframe computer at DAV National Headquarters.

Interim tests will be given following the completion of each lesson plan.

Finally, a post-test will be given to gauge the NSO's overall skill level and to evaluate the effectiveness of the training program.

No one likes to take tests, but DAV officials say the statistics gathered from those tests will go far beyond simply allowing them to measure individual skill levels.

First is the organization's commitment to setting a national standard of excellence—a standard that does not vary regardless of where in the country an NSO is located.

Second is the plan to set up localized or regional training activities by training committees as the need is identified.

Third is the commitment to constantly monitoring the training program's effectiveness—updating topics as changes occur and responding to the ever-expanding and complex field of veterans' claims representation.

Responsibility for keeping the training program current and flexible will fall, in large measure, to the computer. Pointing to past government training programs that failed because they quickly went out of date, DAV training program developers sought ways to avoid that pitfall.

To avoid this, they took a number of steps, including the use of easily modified computer data bases for much of the information, as well as in-house typesetting, printing and distribution facilities. The training program itself is modular in nature and bound into loose-leaf binders. Thus it's easy to add or delete pages, chapters or even entire courses as necessary. And updates will be mailed by National Service Department as changes occur.

Sophisticated computer measuring and analysis technology will also allow rapid identification of problem areas (If too many people are missing a question, it's time to look at the question.), as well as areas of particular success.

That's for today, but tomorrow holds a whole new set of challenges. Even as you read this, DAV staff are examining methods by which they can expand the knowledge available to the NSO literally at his finger tips. They envision a day when NSOs faced with particularly complex cases may be able to access a data base on the DAV mainframe computer and have it do the research for them.

According to Joeckel, "We're the first national veterans' service organization to fully computerize our operations in order to accept the challenges of today, and prepare to meet the challenges of tomorrow.

"Current computer applications involve our membership activities, personnel, inventory, National Service Officer monthly report activities, telecommunications, Emergency and Disaster Relief programs, and many, many other business applications.

"That represents a tremendous financial investment," he said. "More importantly, though, its an investment we've made in the welfare of the people the DAV serves. And that's the only true measure that counts."

DAV TRAINING A HISTORY OF EXCELLENCE

The founding fathers of the DAV had a particular plan in mind for their fledgling organization when they first got together back in 1920. The DAV would be a service organization—in the very best sense of the word—and it would set a goal of providing the best service any disabled veteran or his family member could get.

That meant training, for its professional staff as well as its volunteers. And as a result of that training, the DAV earned its reputation, grew in size and today provides a vast array of professional services and representation to disabled vets around the country.

The DAV's first effort at a formal training program came in 1944. The organization, in cooperation with American University in Washington, D.C., developed a specialized classroom training program for prospective NSOs. Ten classes, each lasting 24 weeks, were conducted between 1944 and 1947.

The 400 service officers who trained in this program formed a nucleus of expertise in the field that served the organization well for many years.

During those years, and up until 1967, these American University trained NSOs conducted on-the-job training for new NSOs as they were hired.

The foundation of technical expertise expanded during these two decades and spread throughout the nation.

By 1967, because of the increased growth in DAV membership, together with an increased awareness of the services offered by the DAV, it was decided to again implement a formal training program at an academic location.

Academic training was conducted at Catholic University in Washington. After this training, service officers were assigned to National Service Offices throughout the country for additional on-the-job training.

Following this, the DAV increased its emphasis on on-the-job training, recognizing the importance of practical experience in the successful representation of veterans' claims. At the same time, the organization entered into agreements with the VA to provide vocational rehabilitation training for eligible disabled veterans seeking to become DAV National Service Officers. This program will remain in effect.

According to one of the first graduates of NSO training at American University back in 1944, the giant step the DAV has taken in applying modern technology to training came just at the right time. "Today, the DAV's new training program for rehabilitated NSOs comes into being at a time when an NSOs job has never been more complex, or the wealth of information more vast," said DAV National Adjutant Denvel D. Adams. "Laws and regulations change, scientists make new discoveries, the veteran population grows more diverse. Modern technology is now being put to work to continue a legacy born 67 years ago: providing the best service a disabled vet can find anywhere...from anyone.

"It's good for the DAV. It's good for disabled vets. And it's good for a group of men and women who are the best...but are always looking for ways to get better...our cadre of professional National Service Officers."

A MESSAGE FROM THE NATIONAL COMMANDER...

Dear Fellow DAV Member,

Excellence is a tough notion to define, even though we know it when we see it. The same can be said of terms such as "service," or "commitment."

Yet they're all words we in the DAV use virtually every day. After all, most of us are members of the DAV because at one time we needed the best in representation for our claims before the VA.

What we found was the benchmark for excellence: the DAV National Service Officer.

On its surface, the DAV's new training program would appear to be just for those National Service Officers—men and women employed in support of the DAV's legacy of service.

Yet the driving force behind the program's development is something greater. It was conceived, developed and executed solely with you in mind—America's disabled veterans and your families.

State of the art training technology will help our NSOs help you—quicker, better and more thoroughly. And that's the bottom line.

Each of us has a personal stake in the success of this training effort. Someday we'll need the expertise only a DAV NSO can provide, or our family members and loved ones will need that expertise.

The very best help—delivered with skill and compassion—will be there for us when we need it, thanks to the extraordinary commitment the DAV has made to the training of its National Service Officers.

We can't always define the best. But with this new DAV training program, the path to achieving excellence is clearly laid out before us.

Cordially,

KENNETH G. MUSSELMANN
National Commander

PVA
PARALYZED VETERANS
OF AMERICA
Chartered by the Congress
of the United States

RESPONSES BY PARALYZED VETERANS OF AMERICA
RESPONSE TO FOLLOW-UP QUESTIONS
SUBMITTED BY SENATOR ALAN CRANSTON
IN CONNECTION WITH THE COMMITTEE ON VETERANS' AFFAIRS
APRIL 28, 1988, HEARING

Question A. Do you have any concern that if judicial review legislation is enacted, your organization will lose the office space and telephones now provided to you free of charge by the V.A.?

Answer: PVA is not concerned that the enactment of judicial review legislation, per se, would lead the VA to deny office space and telephone service to veterans service organizations. Section 3402 of title 38 U.S.C. is very clear in granting the Administrator the authority to furnish available space in VA facilities for recognized representatives of national veterans' service organizations to allow them to represent and provide services to the veteran community.

Current regulations contained in 38 CFR part 14 (Part 14.637) which govern the implementation of Section 3402 are adequate at the present time. We understand, however, that the VA is in the process of reviewing, rewriting and expanding these regulations. PVA encourages the Committee to monitor the design of these new regulations to ensure that the intent of the law is carried out and that the provision of services is not undermined or endangered by granting the Administrator or local station directors greater unilateral discretion in the provision or denial of office space where needed and appropriate.

Question B. Has the V.A. ever suggested to your organization that you might lose free space and telephones if judicial review legislation were enacted?

Answer: To date, this suggestion has not been stated or implied.

Question C. Please provide an estimate of what would it cost your organization to provide similar office space and telephone service, if the V.A. did not provide it?

801 Eighteenth Street, N.W., Washington, D.C. 20006 (202) USA-1300

Page Two

Answer: It would be difficult to estimate the actual cost of leases, fees, rent, equipment, purchases, telephone, relocation expenses, and logistical services, incurred if PVA was forced to relocate each of its forty-nine service offices from existing space in VA facilities. Undoubtedly, the cost would vary greatly, according to new location and local marketplace conditions. However, PVA does estimate each year the value of the VA space currently occupied and certain VA services utilized based on GSA calculations for equivalent worth at those locations.

Fiscal year 1987 estimates for all forty-nine PVA Service Offices are as follows.

Office Space	$356,927.00
Telephone	44,853.00
Parking	14,300.00
Equipment	43,318.00
Equipment Loans (service contracts)	37,043.00
Total	$496,441.00

A better way to respond to this question would be to address the reciprocal of the question:

> "What would it cost the VA to offer identical services provided by veterans' service organizations if VSOs were denied access to VA office space and direct contact with the veteran community?"

There is no question that the services provided by VSOs, free of charge, are of enormous benefit to the VA and veterans across the country. These services, provided by trained veterans service officers and thousands of volunteers on a daily basis, are wholly unique to the VA, as an agency, within the federal government.

Particularly in light of the massive staffing reductions in recent years imposed on the Department of Veterans Benefits, the VA could not begin to provide, or have the staff provide, the quantity of benefit counseling, outreach and claims representation within VA facilities, in communities and remote geographical areas if VSOs did not provide these services.

Putting a price tag on these services is difficult. But considering the equivalent staff hours involved, associated support, staff training, equipment and supplies, we would estimate that pro bono services provided by VSOs would equate to several hundred million dollars per year at a minimum if paid for by the federal government. Add to this figure the thousands of volunteer hours provided through the coordination of VSOs on behalf of veterans in VA hospitals and in communities: transportation, counseling, assistance for homebound veterans, outright cash donations, recreational and medical equipment, sponsorship of special events such as the joint PVA/VA sponsorship of the veterans' wheelchair games. For example, in 1986, PVA's Eastern Paralyzed Veterans Chapter donated over $600,000 to help Mt. Sinai Hospital in New York City purchase a lithotripter which is located at the Bronx VA Medical Center. PVA and its Chapters are donating $1.5 million for the construction and endowment of the PVA/EPVA Center for Neuroscience and Regeneration Research of Yale University which was built on the grounds of the West Haven VA Medical Center in New Haven Connecticut and will be dedicated this month.

There is no doubt that the contributions made by VSOs, on behalf of veterans, far outweigh, many times over, the comparatively small investment on the part of the VA in providing space and access to certain logistical services in VA facilities.

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May 6, 1988

Senator Alan Cranston, Chairman
United States Senate Committee
On Veterans' Affairs
Washington, D.C. 20510-6735

Dear Senator Cranston:

This is in response to your April 29, 1988 letter to me wherein you submitted certain follow-up questions regarding my written comments and testimony before the Committee On Veterans' Affairs at a hearing held on April 28, 1988.

First, you have asked me whether my presence before the BVA has caused the proceedings to become adversarial in nature. My concern is not that the presence of attorneys before the BVA will make the proceedings adversarial in and of itself. Rather, I am concerned that judicial review coupled with the presence of attorneys before the BVA will make the proceedings adversarial. I would also point out that when I have represented claimants before the Veterans' Administration, I have done so with the assistance of service organization representatives. I have always found them to be helpful. Working in conjunction with service organization representatives, my presence before the BVA has not been viewed as adversarial. Often, I allow and invite the service organization representatives to conduct the proceedings and I provide testimony based upon my representation of the service member/veteran before a military administrative board or supply research and investigation that I have conducted into a particular matter. In this circumstance, I have not acted as an advocate in the traditional sense. I cannot predict that my low key approach will be shared by others if S.11 becomes law.

For example, in 1986, I was asked to assist in a very difficult case involving a claim of post traumatic stress disorder (PTSD) on behalf of a World War II veteran. Obviously, the ability to obtain records at such a late date was difficult. Moreover, the service member was seriously ill at the time and unable to provide any meaningful assistance in the preparation of his case. The service organization representative did a valiant job in obtaining the veteran's records. We have arranged to have an expert evaluate the records and the claimant to determine whether or not he was suffering from PTSD and whether or not that PTSD was service connected. I testified in those proceedings based upon my research into the activities of his detachment. We learned that he had landed at Normandy Beach approximately four days after D-Day. We also learned that although a signal corps member, his detachment was involved in combat in the Battle of the Bulge when almost fifty members of his company were killed or wounded. Finally, by tracking his troop movement through old war records, we discovered that this veteran had been one of the first to arrive at a concentration camp in Fulda, Germany. As a Jew, he was mortified by the atrocities that he saw first hand. Old letters tucked away in a box in the attic of his home described the desperation and despair that were caused from these experiences. The BVA determined that this veteran had PTSD and that his disability was service connected.

Second, you asked me whether or not my presence at the BVA was in the best interests of my client. Rhetorically, I suggest to you Senator, that is like asking you whether or not your presence in the United States Senate is in the best interest of the people of California. Those who support you would say "yes", while those who do not would say "no". Obviously, I felt at the time, as I feel today, that the services that I rendered were in the best interests of the veteran. But, again, I must reiterate that my approach was not to treat the BVA as an adversarial forum.

Third, you asked me whether or not I feel that the presence of other attorneys would have a different effect, and if so, why. I can only respond to that question by suggesting to you that it is not the mere presence of attorneys before the BVA that will make the system adversarial. It is the presence of attorneys coupled with judicial review that is likely to result in the system becoming adversarial. The flexibility and informality of BVA proceedings are likely to become more rigid if S.11 is enacted into law. The rules of evidence are more likely to be applied more carefully than in the past. The VA will likely rely upon a staff to present its point of view. The goal of the VA to do what is good for the servicemember/veteran may become obfuscated because the VA's representative before the BVA, either directly or indirectly, will be the opponent of the servicemember/veteran rather than his friend. Doctrines such as waiver, estoppel, laches and applications of limitations are likely to become legal means to ban relief to veterans in otherwise meritorious claims.

Fourth, it is clear from information supplied by the Administrative Office of the Courts that the federal bench can expect the influx of approximately four thousand veterans cases per year under S.11. The VA system is complicated. The VA schedule for rating disabilities is also a complex document. Resolution of Veterans Administration's benefit determinations by a federal judge requires a level of knowledge and sophistication which would have to be acquired. This is not to suggest that it could not be learned, but there would clearly have to be a learning curve. This would take time. Based upon experience with social security cases, judges are inclined to have such matters resolved by the magistrates.

Fifth, I can reconcile my position that thousands of veterans cases would be filed even though the standard that you envision in S.11 is rigid. The Congress does not stop or restrict the filing of lawsuits merely by creating a rigid standard for review. Living in a world of litigation on a daily basis, I can tell you for a fact that many cases are filed that are clearly without merit or close to it. Yet, that does not prevent such claims from being filed, adding further congestion to an already overburdened judicial system. I see no reason why veterans will not file unmeritorious claims or claims that they are not likely to win merely because the standard for review is rigid.

Finally, I am troubled by the standard for review that you create in S.11. There is no judicial predicate for a standard defined as "utterly lacking in a rational basis in the evidence as to result in a manifest injustice". Such a standard almost defies definition. A "mere injustice" is not sufficient to satisfy the burden; it must be a "manifest injustice". Moreover, a decision in a benefit determination case need only be supported by some evidence in order to be sustained by the District Court on review. S.11's standard requires a decision to be "so utterly lacking in a rational basis" which would require a claimant to show that there is absolutely no support for that decision, i.e., it is "irrational". Such concepts are inconsistent with traditional notions of judicial review of administrative action.

I have attached to this letter two decisions from the Army Board for Correction of Military Records which support the position that I stated in my comments to you, i.e., that judicial decisions are likely to create a body of case law that will be utilized by the BVA to limit recovery in otherwise meritorious claims. Moreover, in reference to Senator Kerry's remarks, I represent an individual from the Commonwealth of Massachusetts who was granted a one hundred percent disability from the Veterans Administration on the basis of PTSD, but whose claim was denied by the Army Board for Correction of Military Records on the grounds that he did not file it within three years from the date it should have been discovered by the service member. A battle is now being waged in the Claims Court over the applicability of the statute of limitations to the Plaintiff's claim. Yet, the rigid position being advanced by the Correction Board is illustrative of the hardline available to that agency as a result of judicial review. I have no reason to believe that a similar result will not occur if VA benefit determinations are subject to judicial review.

As I am sure you are aware, in this era of fiscal conservatism, strict application of legal doctrines serves as a tool to limit the exposure of the federal treasury. Such an approach is inconsistent with caring for the valid needs of our nation's veterans.

I appreciate the opportunity of testifying before your committee. I hope that my comments are of some assistance in resolving the difficult problem of extending judicial review to Veterans Administration benefit determinations.

Sincerely,

Keith A Rosenberg

Keith A. Rosenberg

KAR:mrr
Attachments

DEPARTMENT OF THE ARMY
BOARD FOR CORRECTION OF MILITARY RECORDS
WASHINGTON, D.C. 20310-1800

MEMORANDUM OF CONSIDERATION

IN THE CASE OF:

BOARD DATE: 2 March 1988
DOCKET NUMBER: AC86-00879

I certify that hereinafter is recorded the record of consideration of the Army Board for Correction of Military Records in the case of the above-named individual. The following members, a quorum, were present.

Mr. Charles V. Szenas	Chairperson
Mr. Francis W. Frank	Member
Mr. Calvin M. Fowler	Member
Mr. David R. Kinneer	Executive Secretary
Mr. Marc E. Bransky	Examiner

The Board, established pursuant to authority contained in 10 U.S.C. 1552, convened at the call of the Chairperson on the above date. In accordance with Army Regulation 15-185, the application and the available military records pertinent to the corrective action requested were reviewed to determine whether the application was filed within the time established by statute, and if not, whether it would be in the interest of justice to waive the failure to timely file; and if so, whether to authorize a formal hearing; recommend that the records be corrected without a formal hearing; or, to deny the application without a formal hearing if it is determined that insufficient relevant evidence has been presented to demonstrate the existence of probable material error or injustice.

The applicant requests correction of military records as stated in the application to the Board and as restated herein.

The Board considered the following evidence:

Exhibit A - Application for correction of military records
Exhibit B - Military Personnel Records (including advisory opinion, if any)

APPLICANT REQUESTS: Correction of his record to show that he was voluntarily released from active duty vice involuntarily released due to his twice nonselection for promotion to major and such other and further relief as may be deemed just and proper. Counsel notes that although twice nonselected for promotion, the applicant was recommended for promotion by the 1975 "RELOOK BOARD" but chose not to request relief and instead accepted involuntary separation. He is currently a lieutenant colonel with the Washington Army National Guard seeking a National Guard Reserve (AGR) tour, however, due to his being involuntarily relieved from active duty, he is not eligible for an AGR Tour.

PURPOSE: To determine if the application was submitted within the time limit established by law, and if not, whether it is in the interest of justice to excuse the failure to timely file.

EVIDENCE OF RECORD: The applicant's military records show that he served on active duty as a commissioned officer from 8 October 1967 to 7 March 1977. He was considered and not recommended for promotion by the 1975 and 1976 Army of the United States (AUS), major promotion selection boards. On 6 August 1976, he was notified that as a two-time nonselect for promotion he would be released from active duty. However, due to previous selection board irregularities a new 1975 major, AUS board was convened and on 20 December 1976, he was advised that he was recommended for promotion. The applicant was provided with the option of accepting his previous nonselection and involuntary separation or he could apply through this Board for approval of the recommendation of the selection board. On 14 January 1977, the applicant advised that he would accept involuntary separation with readjustment pay. He was honorably separated from active duty on 7 March 1977.

Title 10, United States Code, section 1552(b), provides that applications for correction of military records must be filed before 26 October 1961, or within 3 years after discovery of the alleged error or injustice, whichever is later. Failure to file within 3 years may be excused by a correction board if it finds it would be in the interest of justice to do so.

In the processing of this case, a staff advisory opinion (COPY ATTACHED) was obtained from the Total Army Personnel Agency (TAPA), Promotions Branch.

It does not constitute a basis for excusing the applicant's failure to timely file. The opinion has been filed in the applicant's Official Military Personnel File (OMPF). In rebuttal to the above advisory opinion the applicant responded through counsel stating that subject opinion should be rejected by the Board. It has been incorporated as part of the applicant's OMPF.

DISCUSSION: The alleged error or injustice was, or with reasonable diligence should have been, discovered on 7 March 1977, the date he was separated from active duty. The time for the applicant to file a request for correction of any error or injustice expired on 7 March 1980. The subject application was not submitted within the time required. The applicant has not presented, nor do the records contain, sufficient justification to establish that it would be in the interest of justice to excuse the failure to file within the time prescribed by law.

DETERMINATION: The application is denied because it was not filed within the time required and it is not in the interest of justice to excuse the applicant's failure to do so.

BOARD VOTE:

______ ______ ______ GRANT __________

______ ______ ______ GRANT FORMAL HEARING

______ ______ ______ DENY APPLICATION

fr Mark Bransky
David R. Kinneer
Executive Secretary

DEPARTMENT OF THE ARM
BOARD FOR CORRECTION OF MILITARY RECORDS
WASHINGTON, D.C. 20310-1803

MEMORANDUM OF CONSIDERATION

IN THE CASE OF:

BOARD DATE: 6 February 1985
DOCKET NUMBER: AC83-01727
INDEX NUMBER: 108.00 108.01 108.05

I certify that hereinafter is recorded the record of consideration of the Army Board for Correction of Military Records in the case of the above-named individual. The following members, a quorum, were present.

Mr. Joseph P. Murphy	Chairman
Mr. Francis W. Frank	Member
Ms. Joann H. Langston	Member
Mr. Karl Bielenberg	Acting Executive Secretary
Mr. B. A. Elmore	Examiner

The Board, established pursuant to authority contained in 10 U.S.C. 1552, convened at the call of the Chairman on the above date. Army Regulation 15-185, the regulation governing the operation of the Board, provides that applications and the available military records pertinent to the corrective action requested will be reviewed to: determine whether to authorize a formal hearing; recommend that the records be corrected without a formal hearing; or, to deny the application without a formal hearing if it is determined that insufficient relevant evidence has been presented to demonstrate the existence of probable material error or injustice.

The applicant requests correction of military records as stated in the application to the Board and as restated herein.

The Board considered the following evidence:

Exhibit A - Application for correction of military records
Exhibit B - Military Personnel Records

APPLICANT REQUESTS: Reconsideration of his request for disability retirement.

APPLICANT STATES: That under proper medical care and attention, he should have been placed on the Temporary Disability Retired List (TDRL), rather than honorably discharged.

EVIDENCE OF RECORD: Incorporated herein by reference are military and medical records which show:

On 14 September 1983, the Board considered and denied the applicant's original request for placement on the TDRL. (Copies of the Memorandum of Consideration and opinion of the Office of The Surgeon General are attached).

On 24 September 1984, the Board received the applicant's current request for reconsideration. Included with his request were affidavits from his mother and his wife. In essence, these affidavits described the applicant as nervous after his return from Vietnam in 1970. Also submitted was a copy of a 15 July 1970 psychiatric evaluation by a member of the Medical Corps. This evaluation was in the applicant's military file at the time of the original Board consideration.

On 29 October 1984, the request for reconsideration and the additional documents were forwarded to the Office of The Surgeon General (OTSG) for comment. On 14 December 1984, the OTSG stated that there was no evidence that the applicant exceeded retention standards at the time of release from active duty. It was recommended that the application be denied.

On 20 December 1984, the applicant's counsel submitted a letter, dated 4 December 1984, from a Veterans Administration (VA) staff psychiatrist. It was stated that the July 1970 psychiatric evaluation was the first substantial documented evidence of a stress reaction which has been present in varying degrees from the applicant's combat experiences in Vietnam to the present.

On 14 January 1985, the OTSG reviewed the additional medical evidence submitted by counsel. Attention was invited to the previous OTSG comments. It was stated that the request for reconsideration contained no significant new evidence supporting his case. It was opined that the applicant was medically fit for retention, or appropriate separation, at the time. (The comments by the OTSG are attached.)

Title 10, United States Code, Section 1552(b), provides that no correction may be made unless the claimant files a request therefor on or before 26 October 1961, or within three years after he discovers the error or injustice, whichever is later. However, failure to file within the required time may be excused if the Board finds it in the interest of justice to do so.

Title 10, United States Code, Chapter 61, provides medical retirement, or separation, for members who are unfit to perform the duties of their office, grade, rank, or rating due to physical disability incurred while entitled to basic pay.

Chapter 3, Army Regulation 40-501, dated 5 December 1960, provides standards for medical retention. Basically, members with conditions as severe as listed in this chapter are considered medically unfit for retention on active duty.

Title 38, United States Code, Sections 310 and 331 permit the VA to award compensation for medical conditions which were incurred in, or aggravated by, active military service.

Army Regulation 15-185, effective 1 April 1977, governs the operation of the Board. Paragraph 10c provides, in pertinent part, that if the applicant has submitted evidence, or other matters, that was not in the record at the time of the prior Board consideration, the request for reconsideration will be forwarded to the Board for a determination as to whether or not he has submitted sufficient relevant evidence to demonstrate the existence of probable material error or injustice.

DISCUSSION: Considering all the evidence, allegations, and information presented by the applicant, together with the evidence of record, applicable law and regulations, and advisory opinions, it is concluded:

1. The application was not timely. The applicant was aware at the time of his separation in 1970 that he was not being medically retired. The report of medical history, dated 1 September 1970, showed in his own words that he considered himself in "good" health. His separation physical examination showed that he was qualified for duty. If the military records at that time were in error or unjust, as now alleged, he did not seek relief in a timely manner. The prior Board determination that his appeal was not timely was proper, and it is sustained.

2. The 15 July 1970 psychiatric evaluation was a matter of record at the time of the prior Board decision. While a diagnosis of an acute anxiety reaction was recorded, the condition was not considered so severe at that time as to require medical processing for disability retirement. Only if he was found unfit for employment on active duty at that time would disability retirement have been justified. The opinions of the OTSG support the finding that he was medically fit at the time.

3. The affidavits submitted for review do not establish unfitness for duty at the time. As stated above, the applicant's acute anxiety reaction was a matter of record. However, the medical judgement during service was that this condition did not warrant disability processing/retirement. The OTSG confirms that judgement.

4. The 1984 VA statement provides medical evidence that the applicant's present psychiatric condition is related to his combat experiences in Vietnam. The Board does not dispute this VA interpretation that his mental condition is "service - connected". The law which governs the operation of the VA allows that agency to provide compensation and treatment for medical conditions which it finds are related to military service. However, the VA is not required by law to determine unfitness for further military service at the time of separation, discharge, or retirement. The Army is required by law to find unfitness for duty before a member can be medically retired or separated with disability severance pay. Consequently, due to the two concepts involved, an individual's medical condition although not considered unfitting for military service at the time of processing for

separation, discharge or retirement, may be sufficient to qualify him for VA benefits based on an evaluation by that Agency. A VA finding of "service - connection" does not compel the Army to grant retroactive medical retirement.

5. In consideration of the foregoing conclusions, there is no basis to grant relief in this case. The prior Board denial is confirmed.

DETERMINATION: The applicant has failed to submit the application within the time required, to provide sufficient reasons for failure to do so, or to submit sufficient relevant evidence to demonstrate the existence of probable material error or injustice.

BOARD VOTE:

______ ______ ______ GRANT __________

______ ______ ______ GRANT FORMAL HEARING

______ ______ ______ DENY APPLICATION

Karl Bielenberg
Acting Executive Secretary

The American Legion

For God and Country

★ WASHINGTON OFFICE ★ 1608 "K" STREET, N.W. ★ WASHINGTON, D.C. 20006 ★
(202) 861-2700 ★

May 10, 1988

Honorable Alan Cranston
Chairman
Committee on Veterans Affairs
United States Senate
Washington, DC 20510-6375

Dear Chairman Cranston:

The attached information is in response to the questions that you submitted as a follow up to The American Legion's testimony presented during the Committee's April 28 hearing on judicial review.

Thank you for your interest in the views of the Legion.

Sincerely,

E. PHILIP RIGGIN
Director
National Legislative Commission

Attachment

1. A. Do you have any concern that if judicial review legislation is enacted, your organization will lose the office space and telephones now provided to you free of charge by the VA?

NO.

B. Has the VA ever suggested to your organization that you might lose free space and telephones if judicial review legislation were enacted?

Not to our knowledge.

C. Please provide an estimate of what would it cost your organization to provide similar office space and telephone service, if the VA did not provide it.

Regardless of the cost, The American Legion would continue to provide representation at the Board of Veterans Appeals.

2. I believe that one of the reasons previously raised by your organization in opposition to judicial review as provided in S. 11 is that it will cause delay in an already drawn-out process, does that continue to be a concern?

The issue of delay of claims based upon judicial review was not addressed in our statement of April 28, 1988.

Office of General Counsel Washington D.C. 20420

Veterans Administration

JUN 21 1988

In Reply Refer To: 022

Honorable Alan Cranston
Chairman, Committee on
Veterans' Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am pleased to provide the following responses to your follow-up questions in connection with the April 28, 1988 hearing on judicial review of Veterans Administration (VA) benefit decisions.

Question 1.

A. Would you please comment on the assertion by the Vietnam Veterans of America (VVA) that the VA in 1986 during House consideration of judicial review legislation suggested to veterans groups that free office space and telephone service from the VA might cease if judicial review were enacted.

B. Has the VA given any consideration to such a possibility and what is the agency position on maintaining the current situation regarding free space and telephone service?

Answer 1.

A. Federal law at section 3402 of title 38, United States Code, provides the Administrator with discretion to furnish, if available, space and office facilities for the use of certain veterans service organization representatives. Over the years, the VA has provided office space as well as desks, telephones, typing services, and other "facilities" to several of the major organizations that represent veterans before rating boards and the Board of Veterans Appeals. The close proximity of Agency personnel and service representatives made possible by this sharing of space has enhanced communication and nurtured a special working relationship that has benefited claimants.

Prior to congressional hearings on H.R. 585, 99th Congress, in 1986, the VA prepared a short monograph entitled "Overview of VA's Position on Judicial Review." In examining the potential impact of judicial review legislation and the proposed repeal of the $10 attorney-fee limitation, we observed:

> Moreover, many special considerations currently extended to veterans service organizations may have to be curtailed. The providing of VA space and facilities, informal access to adjudicatory personnel, etc., could be affected by judicial oversight and increased representation by private attorneys.

It is unfortunate that some proponents of judicial review have seized upon and misconstrued this one quote to obfuscate the real concerns for veterans raised in that paper and our subsequent testimony. Taken in context, the quote refers only to potentialities that may or may not be realized. Our paper was intended to simply discuss the kinds of changes that might, at some point, follow imposition of court scrutiny of VA decisionmaking in individual claims and increased participation of private attorneys. Obviously, one cannot predict with certainty how events would unfold, inasmuch as proposals such as H.R. 585 and S. 11, in the present Congress, would entail drastic changes in the VA adjudication process, which has thus far been informal and nonadversarial. We were positing in our observation that private attorneys respresenting VA claimants would not have the luxury of free office space and facilities provided by the Agency nor the intangible advantages derived from the close working relationship between Agency staff and service representatives. From our perspective, it was not inconceivable that this could lead to resentment and charges of favoritism and conflicts of interest.

Unfortunately, our supposition proved correct. Such charges have been made as exemplified by the following statements. "Moreover, service officers fail to act as advocates for veterans. Many have developed 'cozy' relationships with VA officials and are reluctant to challenge Agency decisions or accept unpopular claims. Others have been co-opted by VA largesse, including free office space and telephones . . . ."

Issues Arising in Connection With NARS v. Turnage: Joint Hearing Before the Committee on Veterans' Affairs, U.S. House of Representatives and the Committee on Veterans' Affairs, U.S. Senate, 100th Cong., 1st Sess. 127-128 (1987) (prepared statement of Gordon P. Erspamer, Attorney for the National Association of Radiation Survivors). "Service officers are not required to apprise the veterans whom they represent of a potential conflict of interest, created by the fact that the VA is paying for their offices in the Federal buildings, telephone bills, provides the office furniture, etc." H.R. 585 and Other Bills Relating to Judicial Review of Veterans' Claims: Hearings Before the House Committee on Veterans' Affairs, 99th Cong., 2d Sess., 299 (1986) (prepared statement of Philip E. Cushman, President of Veterans Due Process, Inc.).

B. As you know, much has been made of this purported "veiled threat" to evict veterans service organizations from VA offices. Perhaps the observation we were trying to make in our paper could have been stated more artfully, thereby avoiding any misunderstanding. The VA would not, of its own volition, evict the service officers whose value to claimants has been so amply demonstrated.

Question 2.

A. Please provide the Regional Office error rates for compensation and pension claims, as well as other types of claims, as broken down by type of claim, if available, for each of the previous three fiscal years.

B. Please comment on the assertion by the VVA that the VA denied the existence of the statistics on Regional Office error rates at a hearing in February 1988 before the Subcommittee on Human Resources and Intergovernmental Relations of the House Committee on Government Operations.

Answer 2.

A. We are enclosing the error rates as reported by the regional offices covering fiscal years 1985, 1986, and

1987 as an addendum. They are broken down by regional office and cover the compensation and pension authorization and rating functions. Error rates, expressed as percentages, are categorized as substantive, material, and procedural.

We are unable to supply regional office error rates broken down by type of claim as such data are not available.

B. VVA is mistaken to imply in its April 28, 1988, statement on judicial review legislation that the Veterans Administration attempted to mislead the Subcommittee on Human Resources and Intergovernmental Relations on the keeping of "statistics on 'regional' errors." The line of questioning put to the VA witness at the February 18 hearing was somewhat confusing, referring as it did to regional error rates, instead of statistics on error rates compiled by individual facilities which we term "regional offices" in VA nomenclature.

Prior to a DVB reorganization in January 1986, VA field stations were designated on the basis of geographic location as being in an Eastern, Central or Western Region under a Regional Field Director. While that organizational structure existed, error rates were maintained for each of those regions based upon data supplied by the field stations which comprised the region.

After that organizational arrangement terminated, statistics on error rates for each of the "regions" were no longer maintained on that basis. Perhaps the reorganization and subsequent change in statistical bases led to some confusion in this regard.

Question 3. As you know, under current law, a veteran may receive disability benefits for a service-connected disability either through the military departments or the VA. The amount of disability benefits provided by the military departments depends upon the veteran's base pay at the time of separation or retirement, while the VA's parallel system provides disability benefits which are tied to the amount of disability and not the veteran's military rate of pay. A veteran may not receive both Armed Forces retirement pay and VA compensation, but may elect the one most favorable. This two-tier system seems to lead former military personnel who had higher base salaries to opt for benefits under the military departments, whereas those veterans whose base pay was on the lower end of the military pay spectrum tend to seek benefits from the VA. Decisions made in the military program are reviewable in the U.S. District Courts or the Claims Court after administrative remedies are exhausted, whereas decisions by the VA regarding benefits are not reviewable outside the VA. Please comment on the fairness of this situation which allows higher ranking former military personnel the avenue of judicial review while not making it available to the lower ranking and lower paid veteran unless he foregoes recourse to the more beneficial VA compensation system.

Answer 3. The military disability retirement system differs from the VA disability compensation system in several fundamental ways. However, we question whether the distinctions raise an issue of fairness. A disabled veteran has the opportunity to elect either of the two systems, depending upon the preference of the individual. Although claims for VA benefits are precluded from judicial review in some situations, the administrative adjudication system provided by the VA guarantees veterans a full measure of due process. To the extent the statutory benefit rates and methods of calculating benefits differ under the two systems, we would observe that any disparity is a creation of Congress and defer to congressional judgment in the matter.

It is important to consider that VA's adjudication system has certain distinct advantages, in terms of fairness, over the military disability compensation system. We have noted the following distinctions:

1. Burden of Proof--In the military system, the claimant has the burden of proving that material error or injustice has occurred. This burden is particularly heavy because the Boards for Correction of Military Records (BCMR's) proceed on the presumption of regularity of the record and, as a consequence, the entire burden of proof is upon the claimant to show cause why relief should be granted. In contrast, the VA is obligated to assist a claimant in procuring and assembling pertinent evidence, which needs only to be sufficient to justify a belief in a fair and impartial mind that the claim is well grounded.

2. Filing Limitations-- In the military system, a claimant's request for correction of records must be filed within three years of discovery of the error or injustice. By contrast, a VA claim can be filed at any time, and can be reopened at any time, even after a final BVA decision, simply by proffering new and material evidence.

3. Qualifications and Independence of Decisionmakers-- Members of the BCMR's are appointed by and serve at the pleasure of the Secretaries. With the exception of the Chairman of the Naval BCMR, members are senior civilian employees of the military departments serving on the Boards on a voluntary basis and as an additional duty. Most are not members of the Bar. In the VA system, members of the BVA are appointed by the Administrator and approved by the President. Every BVA member serves on a full-time basis and is either an attorney or a physician.

4. Right to a Hearing-- An opportunity for an oral hearing as a matter of right is not provided in the military disability system. By contrast, VA claimants are entitled to an opportunity for a hearing at any time on any issue involved in the claim. In our view, the right of VA claimants to an oral hearing or hearings is one of the most salient distinctions between the two compensation systems.

Question 4. On page 2 of the VA's testimony, it is stated that "... there are approximately 80 Federal statutes prohibiting judicial review in other spheres of government activity."

A. Please provide a list of those statutes, broken down into categories such as benefits, discretionary functions, and rulemaking.

B. Of these statutes, which, if any, do you believe pertain to situations that are closely analogous to the comprehensive VA benefits system?

Answer 4.

A. For a list of the Federal statutes that bar judicial review, we refer your attention to H.R. 585 and

Other Bills Relating to Judicial Review of Veterans' Claims: Hearings before the House Committee on Veterans' Affairs, 99th Cong., 2d Sess. 122-126 (1986) (paper prepared by the American Law Division, Congressional Research Service of the Library of Congress) and Judicial Review of Veterans' Claims: Hearings before the Subcommittee on Special Investigations of the House Committee on Veterans' Affairs, 96th Cong., 2d Sess. 25-40 (1980) (statement of Richard Berg, Executive Secretary, Office of Chairman of the Administrative Conference of the United States). Copies are attached as addenda for your convenience. The more extensive listing of statutes compiled by the Administrative Conference of the United States is categorized according to the nature of the underlying statute or government program.

B. Given the variety of VA noncontractual benefits and programs, we do not believe that any of these 80 Federal statutes pertain to situations wholly analogous to the VA system. As noted in our statement to the Senate Committee on Veterans' Affairs on April 28, 1988, however, provisions such as the bar to judicial review in the case of Federal Employees Compensation Act claims tend to belie the perception that section 211(a) of title 38 is unique.

Question 5. On pages 4-6 of the VA testimony, it is noted that the advent of judicial review would have the adverse effect of thrusting the VA into an adversarial role by requiring a number of procedures listed below, which the VA, apparently, does not currently follow. For each of the following procedures, please state the reasons why the VA does not currently practice the particular procedure in question, and believes the procedure would have a negative effect on the process of reaching an equitable, fair decision for the claimant:

A. Developing evidence to refute a claimant's contentions in order to ensure that the record supports denial of an unmeritorious claim;

B. Recording each procedural step;

C. Developing and producing evidence, such as consultative opinions and scientific treatises or journal articles to support the medical judgment of the VA's medical adjudicators;

D. Asking direct, probing questions of witnesses to ascertain and evaluate the credibility of the evidence they present so as to articulate why their testimony is found to be "less than persuasive"; and

E. Making thorough, well-reasoned assessments and explicit findings regarding the credibility of witnesses and the cogency of self-serving statements.

Answer 5. The Veterans Administration processes approximately five million claims for benefits annually. This mammoth workload precludes the kind of painstaking development of evidence through discovery, compilation of extensive trial records, elaborate prehearing and courtroom procedures, and adversary argument and cross-examination that characterize the judiciary.

This is not to say that veterans get short shrift. By law and procedure, the VA assists claimants in developing evidence to support their claims, advises them of pertinent substantive and procedural rights, and convenes hearings during which they have the opportunity to present their arguments and testimonial and documentary evidence. All essential safeguards are in place to ensure fairness. Yet, it has been the practice of the Agency to maintain informality and cordiality, where possible. This enables the Agency to effectively deal with the immense workload and provide a system that is "user friendly" and responsive to veterans' needs.

A. It is wise to recall that the VA adjudication process is *ex parte* in nature. Evidence is secured on behalf of a claimant, not in spite of or in contradiction to a claimant. It is the practice of the Agency not to refute contentions which will not support an allowance of the benefit sought. Very often a veteran makes a variety of contentions which may or may not be wholly supported by the record. However, acceptance of these arguments may not provide a basis for favorable action. Because of the non-adversarial philosophy of the Agency, we will not refute these assertions. In other instances, the documentary evidence is at variance with the allegations. This evidence is in the form of hospital reports, medical examinations and other contemporaneous evidence filed in the claims folder. The adjudicators may conclude it is sufficient to answer the contentions and deny the claim or appeal. It is not a practice to obtain the actual office records or complete hospital records folder or investigate the situation in order to refute all contentions. On the other hand, when the adjudicators are of the opinion that the evidence is insufficient to allow the claim or to refute the contentions, they will develop the evidence in order to afford the veteran every opportunity for allowance.

B. The history of a particular claim is well-documented from the information in the claims folder. The folder contains the actual claim forms, documentation of any evidence requests and the responses thereto, hearing transcripts (if a hearing was held), all required rating decisions on the existence and extent of disabilities, all other types of decisions (as required by the individual claim), correspondence with the claimant, documentary evidence submitted by the claimant or others on his or her behalf, and notification of the claimant of the administrative decision, giving the legal and factual basis for the decision. The factors that played a role in the final decision are easily ascertainable from the claims folder. Minor ministerial steps may be recorded informally by means of handwritten notes, memoranda, or computer printouts. With the advent of judicial review, we are concerned that it will become necessary for the Agency to memorialize these incidental steps in more detail and in more formal manners. Doing so will provide no tangible benefit to claimants, will delay the processing of claims, and may be confusing to veterans reviewing their files.

C. The rating boards and Board of Veterans Appeals rely upon accepted and sound medical principles in reviewing factual issues. Moreover, they access established and well-known medical reference works, and the adjudicative panels in medical cases include a member who is trained in general medicine or a specialty particularly relevant to veterans' disabilities. In addition, the veteran is free to submit consultative opinions, scientific treatises, or journal articles for review. If the content of these opinions presents a medical issue or controversy, the evidence of record along with the opinions submitted by the veteran will be submitted to an independent medical expert for review and an opinion. That individual will be familiar with the professional literature relating to the particular medical issue and present an opinion as it relates to the evidence of record. Moreover, the veteran is permitted to review and comment on that opinion before a decision is rendered.

The current system works well and provides a full review of a point of medical controversy to ensure a fair decision. To expand this to require development of medical literature to refute opinions beyond those situations described above would encumber the system without any resulting tangible benefit to claimants. There are many medical contentions presented in claims and appeals that are not supported by accepted medical principles and are not supported or verified by clinical findings. To require intensive documentation with literature to refute these contentions would serve no useful purpose.

D. The type of conduct in examining witnesses acceptable in courtrooms would be inappropriate at a VA hearing. Hearings before the VA are not formal, judicial proceedings. The hearing is held for the benefit of the claimant, and is but one aspect of the VA's mandate to assist the claimant in developing his or her claim. Efforts must be made to ensure that the claimant does not receive the impression that a final decision on the claim or appeal has been reached prior to holding the hearing, or that the Agency is his or her adversary. For example, under present regulations cross-examination is to be avoided. See 38 C.F.R. § 19.157(c).

Consequently, there is a fine line drawn at VA hearings between questioning a witness to ensure the substance or veracity of evidence and maintaining the nonadversarial atmosphere of the proceeding. We are concerned that judicial second-guessing of VA decisions and increased participation of attorneys as veterans' representatives would insinuate a more adversarial influence into VA proceedings that may confuse and threaten witnesses, discourage personal hearings, and deprive our adjudicators of valuable information that could aid the veteran's claim.

E. We assume that claimants are acting in good faith in their dealings with the Agency. Our task is to assess fairly and impartially each piece of evidence introduced into the record. We do realize, however, that memories may be faulty, or that a claimant may tend to recollect events in a way that is favorable to his or her contentions. Many statements or other types of evidence will be self serving. Therefore, each statement submitted is to be evaluated in the light of all other evidence of record.

Rating board and BVA members make thorough, well-reasoned assessments and explicit findings, but take great care to avoid embarrassing the claimant or those who have acted in the claimant's behalf. Where statements or testimonial evidence are discounted for one reason or another, the VA generally states the basis of this lack of acceptance. In a more adversary situation, however, the assessment of the evidence could become quite technical, lengthy, and unpleasant without affecting the outcome of the claim.

Question 6. With regard to the procedure described in question 5(E) above, in light of the requirements of 38 CFR 19.120(b) and 19.180(c), if an adjudicator finds a claimant's testimony of dubious value because he or she believes or suspects that if the claimant were asked certain questions the answers would undermine the claimant's credibility, wouldn't it be more fair to the claimant to ask such questions and find out rather than make any adverse decision based on surmise?

Answer 6. As noted earlier, VA adjudicators do attempt to ascertain the veracity of testimonial evidence, short of cross-examination, and further develop the record where there are inconsistencies or ambiguities in the evidence. We agree that an administrative decision should not be based on an incomplete record or on surmise. To this end, the good judgment of the adjudicator is essential.

Question 7. On the average, how many BVA attorneys participate, either as staff attorneys or as members of a panel, in rendering a final decision on a claim?

Answer 7. Usually one attorney adviser will prepare the tentative decision and two attorney Board members will review the decision if it is a compensation or pension (medically related) appeal. If it is a purely legal issue, three attorney Board members will review the tentative decision, following preparation by the attorney adviser.

Question 8.

A. Please provide the data which supports the VA's statement, on page 13 of the testimony, that the "vast majority of veterans are generally satisfied that they have a fair and impartial forum in the present system".

B. Please comment on the Cambridge study (copy enclosed) which was presented by the VVA at the judicial review hearing and purports to have found that 72% of veterans are in favor of judicial review and compare that to the data on which you are relying, described in part A.

Answer 8.

A. Our observation concerning veterans' general satisfaction with the present claim system states a firmly held belief that has not, to our knowledge, been empirically quantified. However, there are several factors that support our belief.

First, the number of claimants who file appeals of VA benefit decisions is quite low relative to the total number of claim decisions rendered by the Agency each year. In 1987, for example, approximately five million appealable benefit decisions were rendered by the VA, yet only 63,570 appeals were filed in the Board of Veterans Appeals. The incredible disparity between decisions rendered and appeals taken tends to show an impressive level of satisfaction.

Another indicator is the opposition to judicial review legislation among the major veterans service organizations. In the last two Congresses, the American Legion, Disabled American Veterans, Veterans of Foreign Wars, and AMVETS have all registered their opposition to judicial review of individual benefit determinations, that is, judicial review that most directly scrutinizes the decisions made by the Agency on claims. Of course, these organizations officially represent the views of only their memberships. Nevertheless, they do account for a sizeable segment of the veteran population. For instance, the American Legion alone has nearly three million members and another one million auxiliaries.

B. We have three major areas of concern with the survey of veterans' attitudes performed by Cambridge Survey Research: The sampling plan; the preparation discussion with the respondents; and the questionnaire.

First, the limited information provided in the report makes it difficult to assess the validity of the sampling strategy. The methodology section of the report, for instance, states that a nationally representative sample of veterans was interviewed, but does not explain how the sample was selected. We observe that there are approximately 27.6 million veterans nationwide, yet the survey apparently polled only 326 individuals.

Second, there is insufficient data provided in the report to determine if the respondents received sufficent and unbiased preparation prior to their response to the questionnaire. Judicial review of individual VA claims presents a number of controversial issues. In congressional hearings, for example, the Committees on Veterans' Affairs devote their attention to hours of testimony and hundreds of pages of analysis by knowledgeable proponents and opponents of judicial review legislation. We question whether the brief text in the survey, which presents the most simplistic arguments on the subject, laid adequate groundwork for veterans to base an informed response.

Finally, the accuracy of the text and sequence of the survey questions have a crucial bearing on the results in an unsophisticated "yes or no" survey such as that conducted by the Cambridge Survey Research. The validity of the instant survey is undermined by the inaccurate premises posited in the text and the biased sequence of the questions. Whereas the text and question 2 state that veterans alone are denied their day in court, in actuality there are approximately 80 Federal statutes that limit judicial review in various areas of government activity. Moreover, Federal law does not prevent veterans from challenging VA statutes that they believe are unconstitutional, from prosecuting tort claims against the Agency or from litigating certain insurance and loan-guaranty issues. Accordingly, the respondents were asked to give their preference to statements of fact that were not based in reality.

We also observe that question 2 is worded so that the respondent is asked whether veterans should be given another "right." It seems clear to us that most respondents, when asked, would generally favor giving more rights to individuals rather than fewer rights, in any context. The questions are also written in a style and sequence that tend to lead a respondent to the second alternative.

The factual inaccuracies and bias in the survey questions underscore the problems that arise when the topic of judicial review of VA benefit decisions is oversimplified. In our view, the Cambridge Survey Research survey is of questionable statistical validity and limited probative value.

Question 9.

A. Please comment on a proposal by the Paralyzed Veterans of America (PVA) that, as part of lifting the attorney fee limitation, the Administrator should be required to certify attorneys who practice before the BVA to ensure that they are familiar with the proceedings and are ethical, conscientious practitioners.

B. Please comment on the PVA proposal that the Administrator should also be required to certify that all service organization officers representing claimants before the BVA are familiar with the VA proceedings and are ethical, conscientious practitioners.

Answer 9.

A. The profession of law is regulated by the Bar associations of the 50 States, which monitor the ethics of licensed attorneys. Attorneys are bound by codes of conduct requiring them to practice law in a conscientious and scrupulous manner and to zealously and competently represent their clients. Clients who are dissatisfied with the services rendered by their attorneys may complain to special disciplinary boards that are empowered to investigate such matters and suspend, disbar or otherwise discipline attorneys engaged in unprofessional conduct. In our view, BVA certification requirements and procedures would be essentially duplicative of existing safeguards.

We are aware of several Federal agencies that have certification requirements and procedures for those who practice before them, such as the Internal Revenue Service, Patent Office, and Immigration and Naturalization Service. Those agencies have much more intricate and elaborate procedures and law to administer than the VA. The BVA rules of practice are comparatively simple and straightforward.

Accordingly, PVA's proposal on certifying attorneys is unnecessary.

B. Service organization officers are familiar with the BVA rules of practice and have undergone specialized training in handling appeals. Consequently, we do not perceive any compelling rationale for imposing certification requirements on them. In the event the Agency were to adopt certification requirements and procedures, however, we would likely impose them equally on attorneys, agents and service organization representatives.

Question 12. Please comment on a PVA proposal that an adverse decision relating to a request made by a veteran for VA medical services should be reviewed by either a court or an internal review board.

Answer 12. Questions of eligibility for VA medical benefits, i.e., eligibility for hospitalization, outpatient treatment, nursing home or domiciliary care, and prosthetic or adaptive equipment, are appealable to the Board of Veterans Appeals. They are not reviewable in the courts, by reason of section 211(a) of title 38, United States Code. The bases for VA's opposition to judicial review of individual benefit determinations in general apply equally to any proposal to permit judicial review of medical benefit eligibility decisions.

The VA would also oppose a plan to subject individual medical determinations to judicial review. Questions such as the need for or appropriateness of a particular medication or method of therapy are best left to the specialized judgment of the treating physician, and do not lend themselves to intervention or second-guessing by courts or other forums. Moreover, a veteran who is injured by a physician's medical determinations, action, or inaction has the opportunity of seeking judicial redress through malpractice litigation.

Question 13. Please comment on the PVA proposal that the Administrator should have the authority to set the fees for attorneys practicing before the BVA if the fee limitation is lifted.

Answer 13. The setting of attorney fees by the Agency, or even the review of fees for their reasonableness or the determination of "extraordinary circumstances," would involve VA adjudicators in an essentially ministerial duty that may prove unduly burdensome. Petitions for and disputes over attorney fees would take VA personnel away from their principal duty, i.e., distribution of veterans benefits. Moreover, the experiences of other forums suggest that "mass justice" agencies may be ill-equipped to meticulously regulate the payment of fees in individual claims. A recent report published by the Office of Inspector General of the Department of Health and Human Services concluded that administrative law judges in the Social Security Administration, who handle about 92,000 fee petitions annually, were giving perfunctory approval to attorney fee petitions resulting in $23.6 million in excessive charges.

I trust these answers will be of assistance to you.

Sincerely yours,

Donald L Ivers

DONALD L. IVERS
General Counsel

Enclosures

		FY 1985					
		QUALITY:					
STATION NAME	RO #	AUTHORIZATION			RATING		
		SUBSTANTIVE	MATERIAL	PROCEDURAL	SUBSTANTIVE	MATERIAL	PROCEDURAL
ALBUQUERQUE	340	3.5	5.6	9.1	1.1	1.0	3.8
ANCHORAGE	363	1.8	3.3	6.3	1.4	2.4	4.5
ATLANTA	316	4.0	5.0	9.7	1.0	1.6	13.9
BALTIMORE	313	2.4	4.6	7.8	1.3	1.7	10.6
BOISE	347	2.6	4.8	5.1	0.3	0.0	4.4
BOSTON	301	2.0	8.7	10.0	2.2	1.7	5.6
BUFFALO	307	1.0	2.1	5.1	1.4	0.8	4.7
CHEYENNE	442	1.7	3.1	5.3	0.7	1.4	3.8
CHICAGO	328	5.2	10.8	35.7	0.2	0.1	2.8
CLEVELAND	325	1.6	2.7	2.4	1.3	1.6	2.0
COLUMBIA	319	1.0	1.7	2.5	0.3	0.6	2.3
DENVER	339	2.5	4.5	6.0	1.8	2.9	3.5
DES MOINES	333	2.3	5.0	6.7	4.1	2.5	9.9
DETROIT	329	2.0	5.6	7.4	0.8	1.3	3.2
FARGO ND	437	0.3	1.8	2.7	0.0	0.7	3.8
FT HARRISON	436	1.4	4.3	3.6	0.0	1.2	11.0
HARTFORD	308	1.0	4.6	8.7	0.9	1.0	11.9
HONOLULU	359	0.0	1.0	5.2	1.4	0.9	7.2
HOUSTON	362	2.3	5.9	9.4	2.4	3.1	6.7
HUNTINGTON	315	2.1	2.5	2.9	0.6	1.2	2.3
INDIANAPOLIS	326	0.2	4.1	7.7	1.1	3.0	8.9
JACKSON	323	1.1	2.0	4.1	0.1	0.6	2.6
LINCOLN	334	0.3	3.0	3.3	0.6	0.9	2.2
LITTLE ROCK	350	2.4	4.1	4.7	1.2	1.6	6.2
LOS ANGELES	344	1.2	3.1	10.1	1.5	2.6	9.3
LOUISVILLE	327	0.7	1.3	3.0	1.3	1.1	2.8
MANCHESTER	373	2.6	4.4	9.1	0.4	0.4	4.2
MANILA	358	0.3	2.8	2.9	0.4	0.4	2.0
MILWAUKEE	330	3.0	3.6	4.5	2.0	1.4	4.1
MONTGOMERY	322	1.3	1.4	3.5	0.2	0.6	4.0
MUSKOGEE	351	0.2	2.3	3.9	1.7	1.3	3.4
NASHVILLE	320	0.4	1.4	1.0	0.5	1.9	1.8
NEW ORLEANS	321	3.5	6.3	9.3	1.5	1.5	6.4
NEW YORK	306	1.4	2.2	2.3	2.2	4.5	5.4
NEWARK	309	0.3	2.0	2.6	1.3	1.1	2.4
PHILADELPHIA	310	0.6	3.8	4.7	0.5	1.9	3.6
PHOENIX	345	0.4	3.1	3.5	0.7	0.1	3.4
PITTSBURGH	311	3.4	5.2	8.2	2.5	4.5	7.6
PORTLAND	348	1.2	2.6	3.9	0.9	0.5	1.1
PROVIDENCE	304	0.8	4.6	6.0	0.4	1.4	4.3
RENO	354	0.3	1.2	6.3	0.7	0.3	1.7
ROANOKE	314	1.3	1.7	2.8	0.2	0.3	1.9
SALT LAKE CITY	341	0.9	4.8	3.9	1.4	1.7	3.8
SAN DIEGO	377	1.6	3.3	8.9	2.6	1.1	3.2
SAN FRANCISCO	343	1.2	2.5	3.6	0.6	0.4	2.9
SAN JUAN	455	3.1	4.3	5.7	0.1	0.1	4.0
SEATTLE	346	1.1	5.4	12.2	0.7	2.4	4.6
SIOUX FALLS	438	2.8	2.2	2.2	1.9	1.8	3.9
ST LOUIS	331	2.9	3.2	10.4	0.9	0.6	2.1
ST PAUL	335	1.2	3.2	5.7	1.4	0.9	5.8
ST PETERSBURG	317	2.9	3.0	4.3	0.4	0.4	4.1
TOGUS	402	2.1	2.4	3.3	1.7	1.7	3.5
WACO	349	1.9	2.5	3.2	1.9	1.4	2.1
WASHINGTON	372	0.9	2.8	7.9	1.1	1.0	7.0
WHITE RIVER JCT	405	0.6	2.1	1.8	1.7	1.3	3.7
WICHITA	452	1.2	4.2	4.6	0.4	1.0	5.8
WILMINGTON	460	0.0	1.8	4.8	0.6	1.0	4.4
WINSTON SALEM	318	0.9	2.2	2.6	0.2	0.1	3.6

FY 1986

STATION NAME	RO #	QUALITY: AUTHORIZATION SUBSTANTIVE	MATERIAL	PROCEDURAL	RATING SUBSTANTIVE	MATERIAL	PROCEDURAL
ALBUQUERQUE	340	1.7	1.3	4.3	1.7	2.3	3.7
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ATLANTA	316	5.7	7.4	11.3	1.2	0.9	11.3
BALTIMORE	313	1.6	16.1	8.3	1.0	2.8	7.3
BOISE	347	0.7	3.3	5.3	na	0.7	3.7
BOSTON	301	1.4	6.4	10.4	1.7	1.3	4.8
BUFFALO	307	2.4	6.9	15.8	0.7	2.6	5.7
CHEYENNE	442	1.6	2.6	5.5	1.0	1.7	2.7
CHICAGO	328	2.1	9.3	16.5	0.1	0.5	2.2
CLEVELAND	325	1.7	4.4	3.3	2.0	2.3	2.0
COLUMBIA	319	1.0	4.1	3.0	1.6	2.2	2.4
DENVER	339	2.3	6.1	2.7	1.8	2.3	2.5
DES MOINES	333	1.0	2.2	4.7	2.2	2.7	14.0
DETROIT	329	2.0	4.4	6.3	1.0	1.0	2.4
FARGO ND	437	1.0	1.7	3.3	0.3	na	0.3
FT HARRISON	436	0.7	1.9	2.9	0.7	4.9	na
HARTFORD	308	1.3	2.7	5.3	0.7	1.7	4.7
HONOLULU	359	0.7	2.3	5.0	1.0	1.0	6.3
HOUSTON	362	2.9	4.9	12.1	3.7	4.6	9.2
HUNTINGTON	315	2.0	2.7	3.3	1.0	1.3	3.7
INDIANAPOLIS	326	0.8	3.6	7.1	1.2	3.0	7.5
JACKSON	323	1.1	2.1	6.7	na	0.5	2.5
LINCOLN	334	0.7	7.7	3.0	1.4	na	4.2
LITTLE ROCK	350	1.5	4.1	1.7	1.0	1.3	5.3
LOS ANGELES	344	1.4	7.7	15.7	1.4	2.7	9.3
LOUISVILLE	327	0.9	1.8	2.8	2.3	2.0	3.9
MANCHESTER	373	5.7	10.0	10.0	3.0	2.3	9.4
MANILA	358	1.3	1.7	3.0	1.7	0.7	2.3
MILWAUKEE	330	2.3	5.8	2.8	3.2	3.5	3.7
MONTGOMERY	322	1.7	2.6	5.2	1.2	2.2	6.3
MUSKOGEE	351	0.5	2.7	2.9	1.5	1.5	2.7
NASHVILLE	320	1.1	1.4	1.4	1.0	1.5	4.7
NEW ORLEANS	321	3.0	13.0	13.0	1.0	1.7	4.0
NEW YORK	306	2.9	6.6	8.7	1.2	3.5	8.4
NEWARK	309	2.4	1.8	2.9	2.8	2.3	4.6
PHILADELPHIA	310	1.9	4.4	4.9	1.1	3.5	5.0
PHOENIX	345	0.8	2.8	2.1	1.0	0.5	2.9
PITTSBURGH	311	1.8	4.4	3.2	1.9	3.0	8.6
PORTLAND	348	1.1	3.8	5.1	1.7	1.2	0.8
PROVIDENCE	304	0.7	5.7	6.0	3.0	1.0	8.7
RENO	354	1.3	4.8	7.4	0.7	2.0	3.7
ROANOKE	314	0.9	3.5	2.0	0.7	0.4	3.6
SALT LAKE CITY	341	1.0	3.0	6.3	0.3	0.7	6.7
SAN DIEGO	377	2.3	6.5	13.2	1.8	2.9	2.3
SAN FRANCISCO	343	1.6	4.8	3.5	0.5	1.0	2.6
SAN JUAN	455	1.3	4.2	6.8	0.8	2.5	8.0
SEATTLE	346	1.2	4.5	7.8	0.2	3.0	9.9
SIOUX FALLS	438	2.0	4.0	4.0	5.6	2.6	5.2
ST LOUIS	331	1.2	3.6	5.0	1.2	2.1	4.1
ST PAUL	335	1.3	2.3	4.3	0.8	1.6	4.4
ST PETERSBURG	317	2.9	6.0	9.2	0.5	0.6	5.2
TOGUS	402	3.5	5.0	3.0	7.0	4.5	3.5
WACO	349	1.0	3.3	3.5	3.4	2.0	5.6
WASHINGTON	372	2.1	4.2	7.8	1.5	1.2	3.9
WHITE RIVER JCT	405	0.3	1.7	3.7	0.7	1.3	1.0
WICHITA	452	0.8	2.0	4.7	0.7	1.7	5.7
WILMINGTON	460	0.7	3.0	1.7	7.3	2.8	14.5
WINSTON SALEM	318	0.7	2.5	3.6	0.7	0.3	3.6

FY 1987

STATION NAME	RO #	QUALITY: AUTHORIZATION			RATING		
		SUBSTANTIVE	MATERIAL	PROCEDURAL	SUBSTANTIVE	MATERIAL	PROCEDURAL
ALBUQUERQUE	340	3.0	4.3	5.7	1.7	2.0	3.0
ANCHORAGE	363	0.3	4.0	6.0	0.7	4.3	4.3
ATLANTA	316	4.6	3.7	6.5	2.2	0.5	3.1
BALTIMORE	313	1.0	7.1	6.1	0.2	1.0	3.9
BOISE	347	1.7	4.7	6.7	2.3	na	2.3
BOSTON	301	1.5	4.5	11.0	2.2	1.5	3.0
BUFFALO	307	2.5	7.3	10.2	1.7	0.3	5.5
CHEYENNE	442	2.3	5.6	4.3	2.0	1.0	4.1
CHICAGO	328	1.6	3.9	12.3	0.6	0.2	3.1
CLEVELAND	325	1.7	3.5	3.4	1.6	2.2	2.6
COLUMBIA	319	1.0	3.7	3.4	1.2	1.0	1.2
DENVER	339	2.0	2.2	2.5	1.5	2.8	3.5
DES MOINES	333	1.7	4.2	7.8	2.3	1.7	10.2
DETROIT	329	1.9	2.9	3.3	1.1	0.7	2.0
FARGO ND	437	0.3	3.0	3.7	3.0	na	na
FT HARRISON	436	1.7	2.4	3.4	0.5	1.6	na
HARTFORD	308	1.3	2.3	4.7	1.0	2.3	5.0
HONOLULU	359	1.2	6.1	4.3	1.7	1.0	2.8
HOUSTON	362	2.1	4.8	11.1	1.5	2.7	7.0
HUNTINGTON	315	2.0	2.5	3.3	1.7	1.8	3.8
INDIANAPOLIS	326	2.0	4.0	4.6	2.4	2.7	9.0
JACKSON	323	1.0	3.9	7.2	0.7	0.3	4.8
LINCOLN	334	1.9	0.9	0.9	1.4	0.7	5.7
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LOUISVILLE	327	1.3	3.2	4.4	1.8	2.0	3.2
MANCHESTER	373	2.0	4.7	10.0	1.0	0.7	1.7
MANILA	358	2.0	3.3	3.0	2.0	2.7	4.3
MILWAUKEE	330	2.5	3.5	2.2	2.7	3.9	2.5
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MUSKOGEE	351	1.2	2.5	2.0	0.9	1.6	3.1
NASHVILLE	320	0.2	0.8	1.5	0.9	3.1	4.2
NEW ORLEANS	321	2.2	3.2	5.0	1.5	1.0	3.8
NEW YORK	306	2.2	4.6	6.1	1.6	5.2	7.6
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PHILADELPHIA	310	1.2	4.0	4.3	2.0	2.5	5.1
PHOENIX	345	0.8	2.5	4.5	1.5	1.1	3.5
PITTSBURGH	311	2.4	5.5	6.6	1.5	4.2	4.0
PORTLAND	348	0.8	0.5	1.8	2.2	0.5	1.2
PROVIDENCE	304	0.7	1.7	5.0	1.7	2.7	5.7
RENO	354	1.0	3.0	2.7	0.3	na	3.0
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SAN FRANCISCO	343	1.5	5.5	10.4	1.0	2.3	5.8
SAN JUAN	455	3.3	9.5	8.2	0.2	0.8	5.3
SEATTLE	346	0.8	2.7	3.8	0.3	1.7	6.0
SIOUX FALLS	438	1.0	3.7	4.0	1.7	1.7	14.0
ST LOUIS	331	1.6	2.4	3.7	1.8	2.6	4.8
ST PAUL	335	1.3	1.3	3.5	1.6	0.5	5.5
ST PETERSBURG	317	1.8	6.8	12.2	1.0	3.1	9.8
TOGUS	402	3.0	5.7	3.3	5.0	5.3	4.3
WACO	349	1.0	2.8	3.2	3.4	2.0	4.4
WASHINGTON	372	0.8	3.4	9.2	0.7	0.3	1.8
WHITE RIVER JCT	405	1.3	3.0	3.0	2.3	0.7	1.7
WICHITA	452	1.7	3.5	5.8	1.7	1.2	6.7
WILMINGTON	460	1.3	3.3	8.3	2.9	1.9	9.7
WINSTON SALEM	318	0.8	1.9	3.0	0.9	0.5	3.9

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June 10, 1986

TO : House Veterans Affairs Committee
Attention: Pat Ryan

FROM : American Law Division

SUBJECT: Congressional and Judicial Limitations on the Right to Judicial Review of Administrative Determinations under Various Federal Statutes

This is in reference to the inquiry by Mr. Ryan of the committee staff relative to the above. Specifically, in reference to current hearings on preclusion of judicial review of veterans' benefits claims, Mr. Ryan asked that we review and update the list of federal statutes and court cases precluding judicial review of administrative determinations found in Hearings before the Subcommittee on Special Investigations, House Veterans Affairs Committee, on Judicial Review of Veterans Claims, 96th Cong., pp. 25-26 (1980). The attached list, which supplements that earlier compilation from 1980 to the present, includes instances in which Congress by express statutory preclusion, or the federal courts by interpretation of "legislative intent," have limited the availability of judicial review of administrative action. While we have included all such instances of which we are aware, there may be others our research failed to disclose, and accordingly this addendum should be viewed as a selected compilation only. If we may be of further assistance on this matter, do not hesitate to call.

Charles V. Dale
Legislative Attorney

ADDENDUM TO CONGRESSIONAL AND JUDICIAL LIMITATIONS ON REVIEWABILITY OF CERTAIN ADMINISTRATIVE DECISIONS TAKEN PURSUANT TO AUTHORITY DELEGATED BY CONGRESS

1. *Block* v. *Community Nutrition Institute*, 104 S. Ct. 2450 (1984): The U.S. Supreme Court held that the ultimate consumer of dairy products may not obtain judicial review of milk market orders issued by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq*. "Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, it objectives, its legislative history, and the nature of the administrative action involved." *Id*., at 2454.

2. *Greenwood Utilities Comm'n* v. *Hodel*, 764 F.2d 1149 (11th Cir. 1985). The Eleventh Circuit found in its review of sec. 5 of the Flood Control Act of 1944, 16 U.S.C. 825s, governing distribution of excess electricity by the Secretary of Energy, that "the provisions of [the] statute breathe discretion at every pore. . ." and permit "exercise of the widest administrative discretion. . .," with no "law to apply." Accordingly, the Secretary's decision to allocate electrical power among preference customers was unreviewable by the courts.

3. *Investment Co. Institute* v. *Federal Deposit Insurance Corp*., 728 F.2d 518 (D.C. Cir. 1984). The D.C. Circuit Court of Appeals held that the FDIC decision not to consider the merits of ICI's petition that the FDIC declare unlawful a competing saving bank's plan to sell mutual fund shares was an "action

committed to agency discretion by law" and therefore not reviewable under sec. 1818 of the federal banking laws, 12 U.S.C. 1818.

4. The Office of Personnel Management (OPM) "determine[s] questions of disability and dependency" in administering the federal government's provision of annuities to retired employees and their dependents. 5 U.S.C. 8347(c). Subject to administrative review by the Merit Systems Protection Board (MSPB), sec. 8347 (d)(1), OPM's "decisions. . .concerning these matters are final and conclusive are not subject to review," sec. 8347(c). In Lindahl v. OPM, 105 S. Ct. 1620 (1985), the Court held that sec. 8347(c), as amended, of the Civil Service Retirement Act bars judicial review of factual determinations reached by the OPM and affirmed by the MSPB in retirement disability cases, but not of questions of laws and procedure. "When Congress intends to bar judicial review altogether, it typically employs language far more unambiguous and comprehensive than that set forth in sec. 8347."

5. Board of Trade of City of Chicago v. Commodity Futures Trading Comm'n, 605 F.2d 1016 (7th Cir.)), cert. denied 446 U.S. 928 (1980). The appeals court ruled that the Commission's determination that an "emergency" existed and the Commission's consequent order to suspend trading on a commodity under sec. 8a(9) of the Commodity Exchange Act, 7 U.S.C. 12a(9), were precluded from judicial review.

6. The National Guard Claims Act, 32 U.S.C. 717, provides inter alia for settlement of claims up to $25,000 for injury inflicted by members of the Army National Guard while engaged in training duty and within the scope of their

employment. In addition it states that "the settlement of a claim under this section is final and conclusive." The Eleventh Circuit in Rhodes v. United States, 760 F.2d 1180 (11th Cir. 1985) held the judicial preclusion complete and unambiguous as shown by statutory language and legislative history.

7. Earth Resources Co. v. FERC, 617 F.2d 775 (D.C. Cir. 1980) held that judicial review of agency action under the Alaska Natural Gas Transportation Act, 15 U.S.C. 719h(b)(2), is limited to claims of denial of constitutional rights, that the action exceeded the agency's jurisdiction, authority, or limitations or that the action was "short of statutory right;" review for reasonableness or substantial support on the record is precluded.

8. Sinai Hospital of Baltimore, Inc. v. Horvitz, 621 F.2d 1267 (4th Cir. 1980) ruled that judicial review of a decision of the Director of the Federal Mediation and Conciliation Service to appoint a board of inquiry under 29 U.S.C. 183(a) was precluded notwithstanding the absence of express statutory preclusion.

9. International Association of Machinists and Aerospace Workers, AFL-CIO v. Lubbers, 681 F.2d 598 (9th Cir. 1982). Section 3(d) of the National Labor Relations Act, 29 U.S.C. 153(d), and its legislative history indicate the NLRB General Counsel has unreviewable discretion to issue and continue prosecution of unfair labor practice charges.

10. The Ethics in Government Act contains provisions that delimit judicial review of the Attorney General's actions with respect to appointment of independent counsel. That is, the decision to request appointment of independent counsel "shall not be reviewable in any court," 28 U.S.C. 592(f), and the deci-

sion not to request such appointment is likewise explicitly made unreviewable in the special division of the court created in the statute. 28 U.S.C. 592(b)(1). In Banzhaf v. Smith, 737 F.2d 1167 (D.C. Cir. 1984) the appeals court found in these provisions "a specific congressional intent to preclude judicial review, at the behest of the public, of the Attorney General's decisions not to investigate particular allegations and not to seek appointment of independent counsel."

11. Flynn v. Shultz, 748 F.2d 1186 (7th Cir. 1984). In a case involving the Hostage Act, 22 U.S.C. 1732, the court based its decision of nonreviewability both on the "vagueness" of the statutory standard and on the "Executive's discretion to conduct foreign affairs."

Charles V. Dale
Legislative Attorney
American Law Division
June 10, 1986

Attachment B

Congressional and Judicial Limitations on the Reviewability of Certain Administrative Decisions Taken Pursuant to Authority Delegated By Congress

Summary

Although access to federal courts for review of administrative action has been expanded appreciably, certain decisions are "unreviewable." "Unreviewability" is often mentioned in discussions concerning the right to judicial review; however, the fact that approximately 75 statutes either specifically preclude judicial review by making an action unreviewable or have been held by the courts to do so is not generally known. Furthermore, the types of actions that are unreviewable and the precise nature and scope of the unreviewable decisions are also unknown.

During the twentieth century a presumption has developed that administrative action may be reviewed in federal courts unless there is "clear and convincing evidence" to the contrary [Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); Administrative Procedure Act, 5 U.S.C. §702]. This presumption is qualified by an array of judicial and statutory limitations on the availability, scope, timing and forum of review. "Unreviewability" is one of these limitations; it is a threshold question concerning whether a particular issue or action is totally (or partially) immune from review, without reference to who the parties are, or when and where suit is brought. Administrative action is unreviewable when (1) Congress has manifested an explicit intent to shield an action from judicial review, (2) the courts have found, through interpretation of statutory language and legislative history, an implicit Congressional intent to preclude review, or (3) the courts have decided independently of any identifiable Congressional intent that an issue is inappropriate for judicial consideration.

This report examines the instances in which provisions in organic statutes have made federal administrative determinations "unreviewable" in the federal courts, and discusses how the courts have construed this provisions. The caselaw is examined to ascertain Congressional success in limiting review and to study patterns of judicial abstention in this area.

There is no constitutional right to review of all administrative action. The courts have said that they would allow review for constitutional violations, even where review on other grounds may be precluded [Califano v. Sanders, 430 U.S. 99 (1977); Holley v. U.S., 352 F. Supp. 175 (S.D. Ohio, 1972), aff'd 477 F.2d 600 (6th Cir 1973); Wayne State University v. Cleland, 440 F. Supp. 806 (E.D. Mich. 1977); Ralpho v. Bell, 569 F.2d 607 (D.C. Cir 1977); Northeast Emergency Medical Associates P.C. v. Califano, 45 Ad. L. 2d 840 (D.C.E.D. Pa., May 11, 1979); Graham v. Caston, 568 F.2d 1092 (5th Cir 1978) and discussion of Graham in Pollard v. Romney, 512 F.2d 295 (3d Cir 1975); American and European Agencies v. Gillilland, 247 F.2d 95 (D.C. Cir 1957]. Furthermore, actions have been allowed challenging the constitutionality of legislation, even though actions taken under that legislation are precluded from review on questions of law or fact [Johnson v. Robison, 415 U.S. 361 (1974].

One statute has been interpreted as totally barring review (42 U.S.C. §1973b(b), Voting Rights Act). Briscoe v. Bell [432 U.S. 404 (1976] reversed a Court of Appeals' ruling that there is jurisdiction to review actions "which on their face are plainly in excess of statutory authority" and held that judicial review is "absolutely barred." (at 412). The Court justified this "uncommon exercise of congressional power" as a stern and powerful remedy to combat "the pervasive evils and tenacious defenders of voting discrimination." (at 414) [See also South Carolina v. Katzenbach, 383 U.S. 301 (1966) and

Gaston County v. U.S., 395 U.S. 285 (1969)]. The courts will sometimes allow review for actions violating statutory authority [Graham v. Caston, 568 F.2d 1092 (5th Cir 1978); Leedom v. Kyne, 372 U.S. 10 (1963)].

The forty statutes that explicitly preclude review of particular actions fall into a few discrete areas: distribution of benefits, loans, grants and awards; management of federal land; policy decisions affecting certain national goals, such as railroad reorganization, national defense and military service, voting rights, and immigration decisions affecting nonresident aliens.

The courts have implied unreviewability, through study of legislative history and statutory language, in such areas as the distribution of benefits, emergency determinations under safety regulations, policy decisions concerning national labor goals and racial discrimination, and economic regulation of railroad rate changes. There are seventeen such statutes.

In most of these areas, the particular actions or decisions that are unreviewable are limited decisions in which individual rights are either affected to only a small degree or are outweighed by a broader, more significant policy that is furthered by making the decision unreviewable. Sometimes review is allowed on particular issues and not on others within the scope of the decision or some small amount of review is available for limited purposes, such as review for abuse of discretion, or for fraud or gross negligence.

A study of the judicial opinions regarding unreviewable decisions shows that it is sometimes difficult to distinguish between opinions holding agency action unreviewable because the authorizing statute precludes review and those opinions holding agency action unreviewable because it is committed to agency discretion, particularly when analyzing their rationales for the unreviewability. Sometimes the courts refer to the discretion exception as a basis for the decision, and occasionally a claim that discretion has been abused triggers a discussion of the discretion exception. Generally, however, the reasoning that leads a court to a finding of unreviewable discretion takes into account the same factors as do findings of implied unreviewability based on 5 U.S.C §701(a)(1). Some of the actions held unreviewable under 5 U.S.C. §701(a)(1) are discretionary actions and this is used as a basis for the Congressional decision to make review unavailable. Factors distinguishable in the opinions are: a) the decision should lie exclusively with the agency because of its expertise and/or the technicality and complexity of the questions [Kletschka v. Driver, 411 F.2d 436 (2d Cir 1969)]; b) review would interfere with the administrative process [Hahn v. Gottlieb, 430 F.2d 1243 (1st Cir 1970)]; c) the issue is a political question [U.S. v. Pink, 315 U.S. 203 (1942); Curran v. Laird, 420 F.2d 122 (D.C. Cir 1969)]; d) overloading the courts with individual appeals of a relatively minor nature [U.S. ex rel Schonbrun v. Commanding Officer, 403 F.2d 371 (2d Cir 1968), cert denied, 394 U.S. 929 (1969)]; e) need for expedited implementation of congressional programs designed to accomplish important national goals [Braude v. Wirtz, 350 F.2d 702 (9th Cir 1965); Morris v. Gressette, 432 U.S. 491 (1977); Brennan v. Winters Battery Manufacturing, 531 F.2d 317 (6th Cir 1975), cert denied, 425 U.S. 991 (1976), reh denied, 429 U.S. 873]; f) review would disrupt implementation of key national policies [Arrow Transportation Co. v. Southern Railway Co., 372 U.S. 658 (1963); NAACP v. Wilmington Medical Center, 426 F.Supp. 919 (D.C. Del 1977); Briscoe v. Bell, 432 U.S. 404 (1976)]

Opinions construing the reviewability of discretionary actions usually allow limited review for abuse of discretion [Medical Committee for Human Rights v. SEC, 432 F.2d 659 (D.C. Cir), reh denied; vacated as moot, 404 U.S. 403 (1972)] and instances of total unreviewability are limited.

The discrete areas in which the courts have found actions to be totally discretionary and unreviewable are the same categories as those in which Congressional intent to preclude review is found: distribution of benefits, loans, grants and awards, policy decisions affecting national defense and military service, emergency regulatory decisions, and management of federal land and public resources. A further category emerges in this discretionary area, that of administrative decisions regarding program management, such as whether to initiate investigations and issue complaints, choice of sanctions in cease-and-desist proceedings, technical standards for revenue sharing decisions, timing of payments to service providers under Medicare, remission or mitigation of property forfeitures to the U.S. Government, and remuneration of representatives for claimants before the Foreign Claims Settlement Commission.

Language in these decisions concerning review on constitutional grounds is scarce [*Dunlop* v. *Bachowski*, 421 U.S. 560, 572-73 (1975); *Sadlowski* v. *Marshall*, D.C.D.C., C.A. No. 78-0250, Feb. 8, 1979]. Frequently the courts will allow review of certain issues or portions of an action but find other issues or divisible segments of an action or decision unreviewable [*Dunlop* v. *Bachowski*, *supra*; *Save the Bay Inc.* v. *Administrator of EPA*, 556 F.2d 1282 (5th Cir 1977), *reh* and *reh en banc denied*; *Ness Investment Corp* v. *U.S.D.A., Forest Service*, 512 F.2d 706 (9th Cir 1975).]

Appendix
(current through 95th Congress)

I. Statutes containing explicit language precluding review of administrative action

A. Distribution of benefits, loans, grants and awards

38 U.S.C. §211(a) - Veterans' Administration

> ". . . decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors . . . no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise."

5 U.S.C. §8128(b) - Federal Employees Compensation Act

> Secretary of Labor's action in allowing or denying compensation for work-related injuries to federal employees —
> "not subject to review by another official of the United States or by a court by mandamus or otherwise."

42 U.S.C. §1715 - War Risk Hazards Compensation Act

> action of Secretary of Labor in denying or allowing payments under the FECA, which is applicable to the War Risk Compensation Act, is not reviewable by same language as in 5 U.S.C. §8128(b).

22 U.S.C. §1623(h) - International Claims Settlement Act of 1949

> action of the Foreign Claims Settlement Commission in allowing or denying claims by U.S. citizens under the Act against foreign governments for taking their property —
>
> "not subject to review by the Secretary of State or any other official, department, agency, or establishment of the United States or by any court by mandamus or otherwise."

22 U.S.C. §1641m - same language is used to preclude review of the Commission's actions in denying claims against Bulgaria, Hungary, Rumania, Italy and the Soviet Union.

50 U.S.C. App. §2010 - precludes review of the Commission's action in approving or denying claims of specific groups incurring physical or property losses as the result of certain U.S. conflicts.

50 U.S.C. App. §2020 - Micronesian Claims Act of 1971 (terminated August 3, 1976).

> settlements and payments made by the Micronesian Claims Commission regarding claims of compensation for losses incurred by Micronesians during World War II are "not subject to review."

P.L. 95-134, 91 Stat. 1160, Oct. 15, 1977, §105 -

> determinations by the Secretary of Interior that portions of awards made pursuant to Titles I and II of the Micronesian Claims Act are interest and are therefore excluded from payment amounts "shall not be subject to judicial review."

P.L. 95-134, 91 Stat. 1159, Oct. 15, 1977, §104(d) -

> decisions by the Secretary of Interior to make payment to individuals or their heirs or legatees, who were residents of certain atolls in the Marshall Islands on March 1, 1954 as compensation for effects of the thermo nuclear explosion which occurred at Bikini Atoll on that date are "not subject to review by any other officials of the United States, or by any court by mandamus or otherwise."

10 U.S.C. §1084 -

> Secretaries' of Defense and Health, Education and Welfare decisions concerning eligibility for certain benefits and services offered to dependents of military personnel for purposes of medical or dental care
>
> "may not be reviewed in any court or by the General Accounting Office, unless there has been fraud or gross negligence."

37 U.S.C. §403(h) -

> Secretary of Defense's determinations with regard to administration for basic quarters allowances for enlisted personnel, including questions of dependency and relationships, "not subject to review by any accounting office of the United States or a court, unless there is fraud or gross negligence."

37 U.S.C. §604 - designations by the Secretary of Defense as to whom may be paid amounts due a member of the uniformed services for his use or benefit, when that member is mentally incompetent to manage his affairs "not subject to review by an official of the United States or a court"

42 U.S.C. §3374(f) - Demonstration Cities and Metropolitan Development Act of 1966

> determinations and decisions regarding payments and conveyances, the terms and conditions under which they are approved or disapproved, regarding title to property, eligibility for compensation, amounts payable and administration of the transactions, in acquiring title to, holding, managing, disposing of or reimbursing for losses upon private sale of residential property at or near a military installation closed by the Department of Defense, when owned by an employee of the installation "shall not be subject to judicial review."

12 U.S.C. §1735b(c) - National Housing Act

Secretary of Housing and Urban Development's decisions regarding expenditures to correct or reimburse for structural or other major defects in mortgaged homes that are federally insured "shall not be subject to judicial review."

38 U.S.C. §1827(b) - Veteran's Administration

Administrator's decisions regarding payments or expenditures and terms and conditions of such for correcting structural defects seriously affecting the livability of dwellings inspected during construction by VA or FHA, claims arising from such defects, or acquisition of title to such property, where it is encumbered by a mortgage made, guaranteed or insured under certain federal statutes "shall not be subject to judicial review."

20 U.S.C. §1132c-2(a) -

Financial transactions of the Commissioner of Education in carrying out a program of loans and insuring thereof to institutions of higher education for construction, reconstruction or renovation of academic facilities "shall not be reviewable by any court."

42 U.S.C. §1320a-1(f)-Social Security Act -

determinations by Secretary of Health, Education and Welfare to exclude federal payments for capital expenditures by state health care facilities under Medicare and Medicaid where the Secretary determines the expenditures were unnecessary "shall not be subject to administrative or judicial review."

42 U.S.C. §1320c-20(d)(3)(A) - Social Security Act

determinations by Secretary of HEW to suspend a PSRO's (Professional Standards Review Organization) authority when the Secretary decides that the actions of the PSRO have had unreasonable and detrimental impact on total State expenditures "shall not be subject to judicial review."

P.L. 95-291, 92 Stat. 306, Sec 4(c) (95th Cong. 2d Sess., June 12, 1978) -

determinations and findings of the Secretary of HEW regarding reimbursement to the States for expenditures regarding services rendered by the States under the Social Security Act

"No court of the United States has jurisdiction to entertain any action seeking the review of any determination or finding of the Secretary under this Act, or otherwise seeking to compel a determination by the Secretary to certify for payment any claim described by the first section of this Act."

26 U.S.C. §6305(b) - Social Services Amendments of 1974

> Secretary of the Treasury shall assess and collect amounts certified by the Secretary of HEW as child support payments assigned to a state by a parent in an AFDC family for purposes of collection from a deserting parent.
>
> "No court of the United States, whether established under article I or article III of the Constitution, shall have jurisdiction of any action, whether legal or equitable, brought to restrain or review the assessment and collection of amounts by the Secretary under subsection (a), nor shall any such assessment and collection be subject to review by the Secretary in any proceeding. This subsection does not preclude any legal, equitable, or administrative action against the State by an individual in any State court or before any State agency to determine his liability for any amount assessed against him and collected, or to recover any such amount collected from him, under this section."

15 U.S.C. §2703(f)(3) - Automotive Propulsion Research and Development Act of 1978

> Secretary of Energy must certify each contract, grant or project made under the program for development of advanced automobile propulsion systems. The certification attests that a project, etc., meet certain requirements and discusses the relationship of the proposed research to related industry research.
>
> "The provisions of chapter 5 of Title 5 shall not apply to certifications and no court shall have any jurisdiction to review the preparation or adequacy of such certification;"

22 U.S.C. §1641p(b) - Foreign Claims Settlement Commission

> decision to grant a petition for remuneration to agents, attorneys or representatives of claimants, for services rendered in connection with claims, that asks for an amount in excess of 10% of total amount paid on a claim
>
> "The determination of the Commission in ruling upon such petition shall be within the sole discretion of the Commission and shall not be subject to review by any court."

18 U.S.C. §4218(d) - Parole Commission and Reorganization Act

> Actions of the U.S. Parole Commission granting or denying applications and recommendations for parole, imposing conditions on parole orders and modifying or revoking parole orders "shall be considered actions committed to agency discretion for purposes of section 701(a)(2) of title 5."

B. Management of publicly - owned resources.

42 U.S.C. §4602(a) - Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970

guidelines for acquisition of real property by agreement with owners, as offered in 42 U.S.C. §4651, "create no rights or liabilities and shall not affect the validity of any property acquisitions by purchase or condemnation."

43 U.S.C. §1611(b) - Alaska Native Claims Settlement Act

the actions of the Secretary of the Interior and Alaska Regional Corporations in allocating land among villages are "not subject to judicial review"

43 U.S.C. §1652(d) - Trans-Alaska Pipeline Authorization Act

". . . the actions of the Federal officers concerning the issuance of the necessary rights-of-way, permits, leases and other authorizations for construction and initial operation at full capacity of said pipeline system shall not be subject to judicial review under any law except that claims alleging the invalidity of this section may be brought within sixty days following November 16, 1973, and claims alleging that an action will deny rights under the Constitution of the United States, or that the action is beyond the scope of authority conferred by this chapter, may be brought within sixty days following the date of such action. A claim shall be barred unless a complaint is filed within the time specified."

C. Policy decisions concerning achievement of certain national goals

45 U.S.C. §522 - Rail Passenger Service Act

The Secretary of Transportation's report designating the "basic system" of intercity rail passenger service is reviewed by the ICC, State Commissions, and representatives of the railroads and labor organizations. The Secretary is to give any comments and recommendations made in this review "due consideration" when making his final report to Congress.

"The basic system as designated shall become effective for the purposes of this chapter upon the date the final report of the Secretary is submitted to Congress and shall not be reviewable in any court."

45 U.S.C. §718(d)(2) - Regional Rail Reorganization Act

action of the U.S. Railway Association, a nonprofit incorporated association founded in accordance with the Act, in modifying the final system plan upon petition by a State is "not subject to review by any court."

45 U.S.C. §718(d)(3)(C) - modifications or additions for certain brief periods to designations of rail properties under the final system plan are "not subject to review by any court."

45 U.S.C. §719 - exclusive method of review of the final system plan -

may only be reviewed with respect to the value of rail properties to be conveyed and the value of consideration received. This review is to be done by a "special court" (3-judge district court), whose determinations may not be reviewed, except for their final order, which may be reviewed only by the Supreme Court if certiorari is requested within a certain period of time.

45 U.S.C. §852(c) -

All orders of the Operations Review Panel, which represents users of the Northeast Corridor rail transportation facilities, are "not subject to review by any court".

50 U.S.C. §47d(b) -

determinations of the Attorney General as to whether a person furnishing information concerning atomic weapons and special nuclear materials is entitled to a reward and the amount to be paid, when made after consultation with the Atomic Energy Commission, and with the approval of the President when the reward is more than $150,000, are final and conclusive and "no court shall have power or jurisdiction to review" them.

42 U.S.C. §2155(a)(2) - Nuclear Non-Proliferation Act of 1978

A decision by the NRC not to make certain narrow findings regarding export licensing procedures for special nuclear materials is not subject to review.

42 U.S.C. §2160a -

"No court or regulatory body shall have any jurisdiction under any law to compel the performance of or to review the adequacy of the performance of any Nuclear Proliferation Assessment Statement called for in this Act or in the 1954 Act."

50 U.S.C. App. §1216(a)(6) - Renegotiation Act of 1951 (now terminated).

Regulations designating classes and types of defense contracts which are exempt from provisions regarding excessive profits, and determinations that a contract is or is not exempt under the regulations "shall not be reviewed or redetermined by the Tax Court or by any other court or agency."

42 U.S.C. §1973b(b) - Voting Rights Act of 1965

determinations by the Attorney General and the Director of the

> Census which lead to the inclusion of states or political subdivisions in the coverage of §1973b,d,k "shall not be reviewable in any court."

50 U.S.C. App. §460(b)(3) - Selective Service System

> "... No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title . . ., after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: Provided, that such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards and the President only when there is no basis in fact for the classification assigned to such registrant."

8 U.S.C. §1105a(b) - Immigration and Nationality Act of 1952

> "(b) Notwithstanding the provisions of any other law, any alien against whom a final order of exclusion has been made heretofore or hereafter under the provisions of section 1226 of this title or comparable provisions of any prior Act may obtain judicial review of such order by habeas corpus proceedings and not otherwise."

8 U.S.C. §1503(c) -

> 8 U.S.C. Sec. 1503(b) authorizes that certificates of identity may be issued by a diplomatic or consular officer of the United States in a foreign country to a person who claims a right or privilege as a United States' national and is denied the right or privilege by a department, agency or official thereof upon the ground that he is not a national. 8 U.S.C. Sec. 1503(c) provides that a person issued a certificate of identity under Sec. 1503(b) may apply for admission to the United States. Sec. 1503(c) states:
>
> > "A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise."

D. Presidential actions with regard to foreign affairs

49 U.S.C. §1486(a) - Federal Aviation Program

> orders concerning foreign air carriers subject to the approval of the President under 49 U.S.C. §1461 are not subject to review

II. Statutes whose language and legislative history have been interpreted by the courts to imply preclusion of judicial review under 5 U.S.C. §701(a)(1)

A. Benefits

42 U.S.C. §405(g) - Social Security Act

no judicial review of a decision by the Secretary of HEW not to reopen a previously - adjudicated claim for benefits

Califano v. *Sanders*, 430 U.S. 99 (1977)

42 U.S.C. §405(h) - Social Security Act

where it has been incorporated in another act without its corresponding provision 42 U.S.C. §405(g).

42 U.S.C. §1395ii
42 U.S.C. §1395oo
42 U.S.C. §1395u(b)(5)

*See full report for a discussion of the case law on this provision.

31 U.S.C. §242 - Military Personnel and Civilian Employee's Claims Act

settlement of claims by military or civilian personnel for damages to or loss of personal property incident to service

Macomber v. *U.S.*, 335 F. Supp. 197 (D.R.I. 1971)

B. Emergency determinations in safety regulation

7 U.S.C. §135b(c),(d) - Federal Insecticide, Fungicide and Rodenticide Act

emergency actions by the Administrator concerning registration of economic poisons

NorAm Agricultural Products Inc. v. *Hardin*, 435 F.2d 1151 (7th Cir. 1970)

7 U.S.C. §1136 - Sugar Act

Secretary of Agriculture's findings in particular rate proceedings and the hearing upon which such findings are based
Mario Mercado e Hijos v. *Benson*, 231 F.2d 251 (D.C. Cir. 1956)
Casares v. *Knebel*, 557 F.2d 826 (D.C. Cir. 1976)

49 U.S.C §1429(a) - Federal Aviation Act of 1958

FAA Administrator's summary suspension of an airworthiness certificate when he finds the existence of an emergency

Morton v. *Dow*, 525 F.2d 1302 (10th Cir. 1975)

C. Decisions regarding national labor policy and elimination of racial discrimination

7 U.S.C §1136 - Sugar Act

Secretary of Agriculture's determination to pay subsidies to certain producers of sugarcane and sugar beets who pay fair wages to their employees

7 U.S.C. §1385 - Soil Conservation Act
7 U.S.C. §1785 - National Wool Act

factual determinations underlying operations or payment are unreviewable

Gross v. U.S., 505 F.2d 1271 (Ct. Cl. 1974); Aycock - Lindsey Corp. v. U.S., 171 F. 2d 518 (5th Cir. 1948); U.S. v. Moore, 298 F. Supp. 199 (S.D. Ohio 1969); U.S. v. Blackwell, 467 F. 2d 1377 (5th Cir 1972).

42 U.S.C. §152, Ninth - Railway Labor Act

action by the National Mediation Board in using "appropriate" methods for ascertaining names for employees' representatives

Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297 (1943)

Kirkland v. Atlantic Coast Line R. Co., 167 F.2d 529 (D.C. Cir. 1948)

45 U.S.C. §153, First, (m) -

awards made by Railroad Adjustment Board on, of underlying grievances submitted to the Board

45 U.S.C. §153, First (a) -

those aggrieved by the failure of the Board to make an award or to include certain terms in an award made by the Board

factual determinations by the Railway Adjustment Board are not subject to judicial review

Union Pacific RR Co. v. Sheehan, 99 S Ct. 399, 439 U.S. 89, 1978.

NLRB's decision that hospital house staff are not covered by NLRB Act

Physicians National House Staff Assn. v. Murphy, 47 L.W. 2667 (April 24, 1979), vacated, 49 L.W. 2070 (D.C. Cir en banc, July 11, 1980)

U.S.C. §1973c - Voting Rights Act of 1965

Attorney General's failure to object within 60 days to the implementation of a voting law is not subject to judicial review

Morris v. *Gressette*, 432 U.S. 491 (1977)

Equal Employment Opportunity Commission determination of reasonable cause to believe that a charge of discrimination filed against a party was true

Georator Corp v. *EEOC*, 592 F.2d 765 (4th Cir 1979)

D. Suspension of rate changes

49 U.S.C. §15(7) -

ICC order suspending railroad rate changes - courts may not grant injunctive relief nor appraise reasonableness of rates
Arrow Transportation Co v. *Southern Railway Co.* 372 U.S. 658 (1963)
Trans Alaska Pipeline Rate Cases, 436 U.S. 631 (1978).

16 U.S.C. §824d(e) -

FERC order suspending public utility rate changes

Municipal Light Boards v *FPC*, 450 F.2d 1341 (D.C. Cir 1971), *cert denied*, 405 U.S. 989 (1972).
Connecticut Light and Power Co. v *FERC*, D.C. Cir, D.C. No 78-2312, May 30, 1980.

III. Statutes that have been interpreted by the courts as committing agency action to agency discretion under 5 U.S.C. §701(a)(2).

A. Benefits, loans, grants and awards.

Termination of Veteran's Administration research grants—*Kletschka* v. *Driver*, 411 F.2d 436 (2d Cir 1969)

7 U.S.C. §904 - loans for rural electrification

Alabama Power Co. v. *Alabama Electric Cooperative Inc.*, 394 F.2d 672 (5th Cir 1968), *reh denied*, 397 F.2d 809, *cert denied*, 393 U.S. 100

REA v. *Central Louisiana Electric Co.*, 354 F.2d 859 (5th Cir), *cert denied*, 385 U.S. 815 (1966).

12 U.S.C. §1715*l*(d)(3) - National Housing Act

FHA decisions to grant rent increases

Hahn v. *Gottlieb*, 430 F.2d 1243 (1st Cir 1970); *Langevin* v. *Chenango Court Inc.*, 447 F.2d 296 (2d Cir 1971); *Grace Towers*

Tenants Assn. v. Grace Housing Development Fund Co. Inc., 538 F.2d 491 (2d Cir 1976); Harlib v. Lynn, 511 F.2d 51 (7th Cir 1975).

B. National defense decisions that limit individual rights

50 U.S.C. App §32(a) - Trading with the Enemy Act

no judicial review for claims of enemy nationals
Schilling v. Rogers, 363 U.S. 666 (1960)

Action by the military denying a reservist's request for exemption from active duty - U.S. ex rel Schonbrun v. Commanding Officer, 403 F.2d 371 (2d Cir 1968), cert denied, 394 U.S. 929 (1969).

C. Administrative program management decisions

49 U.S.C. §15(8)(a), §13a(1) - ICC decisions whether to investigate legality of proposed rates, and rail carrier's proposed discontinuance of operation or services on interstate passenger trains
Southern Railway Co v. Seaboard Allied Mining Corp, 99 S. Ct. 2388 (1979); City of Chicago v. U.S., 396 U.S. 162 (1969)

NLRB decisions to investigate or issue complaints for unfair labor practices
Vaca v. Sipes, 386 U.S. 171 (1967); Saez v. Goslee, per curiam, 463 F.2d 214 (1st Cir 1972), cert denied, 409 U.S. 1024; Tensing v. NLRB, 519 F.2d 365 (6th Cir 1975).

15 U.S.C §45(b) -

FTC's denial of a request to intervene in a precomplaint consent negotiation
Action on Safety and Health v. FTC, 498 F.2d 757 (D.C. Cir 1974)

31 U.S.C. §1221 - State and Local Fiscal Assistance Act of 1972

use of census figures as the controlling standard for allocating funds to state and local governments under the Act
City of Newark, N.J. v. Blumenthal, 457 F.Supp. 30 (D.C. D.C. 1978).

42 U.S.C. §1395g - Medicare Act

timing of payments to providers of services is discretionary and unreviewable
Greater New York Hosp. Assoc. v. Mathews, 536 F.2d 494 (2d Cir 1976)

19 U.S. §1618 - decision to allow remission or mitigation of a forfeiture of property under federal statutes

U.S. v. One 1961 Cadillac, 337 F.2d 730 (6th Cir 1964); Wiren v. Eides, 542 F.2d 757 (9th Cir 1976); U.S. v. One 1957 Buick Roadmaster, 167 F.Supp. 597 (E.D. Mich 1958).

D. Presidential policy decisions

10 U.S.C. §2631 - Cargo Preference Act

actions of the Executive pertaining to the reserve fleet's establishment expansion, curtailment, maintenance and use
Curran v. *Laird*, 420 F.2d 122 (D.C. Cir 1969).

E. Emergency regulatory determinations

7 U.S.C. §12a(9) - Commodity Exchange Act

decision to invoke emergency powers under the Act
Board of Trade of City of Chicago v. *CFTC*, 46 Ad L. 2d 309 (7th Cir, Sept. 12, 1979).

F. Management of publicly-owned resources

43 U.S. §§1411-18 - Classification and Multiple Use Act of 1964

classification of federal and as suitable for disposal or for retention, affecting the availability of land for homestead entry
Strickland v. *Morton*, 519 F.2d 467 (9th Cir 1975)

43 U.S.C. §315 - Taylor Grazing Act

decision of Secretary of Interior affirming the partial cancellation of grazing allotments
Mollohan v. *Gray*, 413 F.2d 349 (9th Cir 1969)

43 U.S.C. §682a - Small Tract Act

decision to classify land as suitable for transfer
Lutzenhiser v. *Udall*, 432 F.2d 328 (9th Cir 1970)

43 U.S.C. §620 *et seq* - Colorado River Storage Project Act

Secretary of Interior's action in contracting for the sale of hydroelectric power

Arizona Power Authority v. *Morton*, 549 F.2d 1231 (9th Cir. 1977), *reh. and reh. denied en banc*
City of Santa Clara, Calif. v. *Andrus*, 572 F.2d 660 (9th Cir. 1978).

16 U.S.C. §497 - National Forests

U.S. Forest Service decision to award a special use permit for operation of a resort in a national forest
Ness Investment Corp. v. *U.S. Dept. of Agric, Forest Service*, 512 F.2d 706 (9th Cir 1975).

16 U.S.C. §668dd(b)(3) - Endangered Species

Secretary of Interior's authority to transfer land title from the U.S. to public utility companies
Sierra Club v. Hickel, 467 F.2d 1048 (6th Cir 1972), cert denied, 411 U.S. 920 (1973).

Attachment C

RECOMMENDATION 73-3

QUALITY ASSURANCE SYSTEMS IN THE ADJUDICATION OF CLAIMS OF ENTITLEMENT TO BENEFITS OR COMPENSATION

(Adopted June 8, 1973)

The Federal Government is engaged in either the direct administration or the funding of a substantial number of programs which involve the adjudication of claims of entitlement to benefits or compensation. Examples include veterans' benefits; the basic Social Security (OASDI) programs; Medicare and Medicaid; public employee retirement benefits; federal employees' and longshoremen's and harbor workers' compensation programs; and programs of categorical public assistance for the aged, blind and disabled and for dependent children.

In many of these programs the number of claims per year is very large while at the same time the determinations of fact and law involved in adjudicating an individual claim may be quite complex and difficult. Moreover, claimants under these programs often lack the personal resources or access to technical assistance necessary to prepare claims material adequately and to pursue hearing or administrative appeal procedures should their claims be denied. These factors give rise to a particular concern with the quality of the adjudication process and product at all levels of the administrative process in programs which make determinations concerning large numbers of claims of entitlement to individual benefits or compensation.

As a part of a continuous effort to provide the highest possible degree of accuracy, timeliness and fairness in the adjudication of claims, the following recommendation should be adopted by agencies which directly administer benefit and compensation programs and by agencies which have a capacity and a responsibility to assure the quality of claims adjudication by grantees of federal funds.

Recommendation

1. Positive caseload management should be recognized as essential to the accurate, timely and fair adjudication of claims of entitlement to benefits or compensation. A positive caseload management system should include three connected operations: (1) the development of standards and methods for measuring the accuracy, timeliness and fairness of agency adjudications; (2) the continuous evaluation of agency adjudications through the application of those standards and

methods; and (3) the use of the information gathered in the course of such evaluation to identify needed improvements in adjudicative performance.

2. As part of their positive caseload management program, agencies should begin immediately to explore, develop and implement statistical quality assurance reporting systems that will indicate the accuracy, timeliness and fairness of claims processing. In designing such systems, agencies should consider the need for information of a type that:

(a) Reflects differences in the types of cases and types of issues adjudicated and the stages of the administrative process involved;

(b) Identifies the management unit or, where appropriate, the individual adjudicator involved in order that effective action may be taken to reinforce success and to improve performance;

(c) Permits separate evaluation of (1) substantive decision-making, (2) case development effort and (3) procedural regularity;

(d) Enables separate evaluation of particular functions of the decision process (*e.g.*, issue statement or evaluation of evidence in substantive decision-making).

3. Agencies should employ such other techniques for gathering information on their adjudication process, including field investigations and special studies, as are required for the evaluation of accuracy, timeliness and fairness. Agencies should be particularly sensitive to the need for better information on the extent to which claimants' personal resources, social status and access to representation or other assistance may affect the adjudication of claims.

4. The positive caseload management program should facilitate not only objective evaluation of the agency's case processing operation, but also the effective utilization of quality assurance information in policy formation and operational control.

VETERANS OF FOREIGN WARS OF THE UNITED STATES

OFFICE OF THE DIRECTOR

May 10, 1988

The Honorable Alan Cranston
Chairman
Committee on Veterans' Affairs
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Please find enclosed the Veterans of Foreign Wars response to questions submitted by you with respect to testimony given during the recent Senate Veterans' Affairs Committee hearing on April 28, 1988.

With best wishes and kind regards, I am

Sincerely yours,

James N. Magill

JAMES N. MAGILL, Director
National Legislative Service

JNM/slw:daa
Enclosure

★ WASHINGTON OFFICE ★
VFW MEMORIAL BUILDING ● 200 MARYLAND AVENUE, N. E. ● WASHINGTON, D. C. 20002 ● AREA CODE 202-543-2239

QUESTION 1. A. Do you have any concern that if judicial review legislation is enacted, your organization will lose the office space and telephones now provided to you free of cahrge by the V.A.?

RESPONSE 1. A. Yes. As you know, Title 38 of the United States Code provides that the Administrator of the Veterans Administration may, at his descretion and, should space be available, provide office and telephone services to the major veteran organization in conjuction with the adjudication of VA claims. We, of course, would prefer Congress to mandate this space because of the invaluable service rendered by the major veterans service organizations.

QUESTION 1. B. Has the V.A. ever suggested to your organization that you might lose free space and telephones if judicial review legislation were enacted?

RESPONSE 1. B. To my knowledge the Veterans Administration has never directly suggested we would lose space and telephone service now offered us. However, we are aware such remarks have surfaced.

QUESTION 1. C. Please provide an estimate of what would it cost your organization to provide similar office space and telephone service, if the V.A. did not provide it?

RESPONSE 1. C. The Veterans of Foreign Wars is unable to accurately estimate the cost of leasing office space should we be forced to vacate our present locations. It would be assumed our expenses would be in excess of the cost per square foot now being charged GSA.

QUESTION 2. A. I believe that one of the reasons raised by your organization in opposition to judicial review as provided in S. 11 is that it will cause delay in an already drawn-out process, is that correct?

RESPONSE 2. A. Yes.

QUESTION 2. B. Since the review provided for in S. 11 does not occur until after the entire V. A. claims adjudication process is over, what delay are you referring to?

RESPONSE 2. B. It will cause a slow down in the adjudication process requiring additional development of both positive and negative evidence. Also, it will result in more remands so as to prevent overrulings by the federal court.

QUESTION 2. C. Why wouldn't an individual who has already lost his claim with a final denial by the B.V.A., and who but for judicial review would have no opportunity to be awarded the benefits in question, view the time spent in going to court as an investment in possibly obtaining benefits rather than as a delay?

RESPONSE 2. C. We can agree with this premise providing any court proceedings be restricted solely to review of law or regulation.

Vietnam Veterans of America, Inc
2001 S St., NW
Suite 700
Washington, DC 20009-1125

(202) 332-2700

May 6, 1988

Senator Alan Cranston, Chairman
Senate Committee on Veterans Affairs
SH-112 Hart Senate Office Building
Washington, DC 20510-0501

Dear Senator Cranston:

Thank you for the opportunity to respond to questions in regard to our April 28, 1988 testimony before the Senate Committee on Veterans Affairs. Your questions and our responses are as follows:

Q. **Do you have any concern that if judicial review legislation is enacted, your organization will lose the office space and telephones now provided to you free of charge by the VA?**

A. No. We have independent VVA Service Representatives and VVA recognized state agencies, co-located with VA Regional Offices (VARO's), who use office space and telephone service provided by the VA. In other areas we have service representatives who advance and review claims without being physically located in a VARO and who do not receive office space or telephone support from the VA.

The enactment of judicial review legislation would not substantially change the nature of the work performed by VVA service personnel. There is no logical correlation between the enactment of legislation permitting judicial review of adverse VA decisions and the ability of a service organization to continue in a supportive role to both veterans and a local VA Regional Office.

Q. **Has the VA ever suggested to your organization that you might lose free office space and telephones if judicial review legislation were enacted?**

A. Yes, indirectly. In June 1986, just prior to hearings on judicial review before the House Veterans Affairs Committee, the VA Central Office informed each state's director of veterans affairs to expect the following if judicial review were enacted:

"Moreover, many special considerations currently extended to veterans service organizations may have to be curtailed. The providing of VA space and facilities, informal access to adjudicative personnel, etc., could be affected by judicial oversight and increased representation by private attorneys."

VVA, not unlike many veterans service organizations, recognizes and relies on some of these state agencies to deliver basic service to those seeking to be represented by VVA. Enclosed is the remaining text of what appears to be the VA's not so subtle attempt to manipulate these agencies by threatening to disrupt the existing structure of service organization representation before VARO's.

Beginning with their September 1986 convention, and at their three subsequent biannual meetings, the National Association of State Directors of Veterans Affairs (NASDVA), has considered the issue of judicial review of adverse VA decisions. It would appear that under intense pressure from VA officials during their meetings, and ever mindful of the VA's ability to negatively impact on their individual agency's operation, NASDVA's members have chosen not to take a definitive position on judicial review.

Collectively, the agencies represented by NASDVA's members serve more veterans before the VARO's than any other single veterans service organization. Accordingly, NASDVA's support of judicial review would carry great weight in the debate on this issue. The VA's 1986 correspondence to members of NASDVA, coupled with continued pressure, strongly suggest that economic leverage, in regard to office space and telephone service, is willfully being used by the VA to prevent NASDVA from taking a position on judicial review.

Even more disturbing, is what appears to be the emergence of a pattern in which the VA takes punitive action in regard to the assignment of office space to organizations advocating judicial review. Conversely, it appears that favoritism is shown to those organizations that support the VA's opposition to judicial review. As an example, the following situation encapsulates the way in which the VA appears to use the assignment of office space to punish or reward veterans organizations according to their position on judicial review.

In 1986, following the House Veterans Affairs Committee's tabling of H.R. 585, I represented the Virginia Division of War Veterans' Claims (DWVC), at the NASDVA Convention. During this convention, with assistance from a number of other state directors, DWVC successfully introduced a pro-judicial review resolution. The resolution was tabled after much debate on what the reaction would be if NASDVA supported judicial review. However, tabling of the issue was done with the stipulation that it would be considered again during NASDVA's 1987 winter conference.

Immediately following the 1986 NASDVA Convention, Virginia's DWVC was notified by the VARO Director that its VA provided office space would be reassigned and that DWVC would be forced to relocate to another location in the VARO. The DWVC, which represents veterans in its own right and on behalf of twelve independent veterans service organizations, was moved to a small space in the back of the building. The Disabled American Veterans (DAV) claims office, with a smaller clientele than the DWVC's, was given the DWVC's office space.

In its old location, DWVC was adjacent to the VARO's Veterans Services Division, which is the primary contact point for veterans visiting the VARO. Accordingly, veterans and their dependents could readily access the DWVC for assistance. In its new location, which is well removed from the areas normally accessible to veterans visiting the VARO, the DWVC's clients must first walk though the DAV office and the office area of several other independent organizations to find the DWVC.

Some employees of the DWVC believe the VARO's decision to relocate their office was a direct result of their organization's staunch advocacy of judicial review. Likewise, many of these same employees believe the DAV's public and tacit opposition to judicial review was rewarded by the VARO. Whether these beliefs are true or not is irrelevant given the appearance of the VARO's action in regard to the assignment of office space at the VARO in Roanoke, Virginia.

Q. **Please provide an estimate of what would it cost your orga-**

nization to provide similar office space and telephone service if the VA did not provide it?

A. This question appears to based on the status quo assumption that it is either necessary or desirable to have service organization personnel co-located with a VARO. Perhaps a more appropriate question would be; "How much would it cost the VA not to provide office space and telephone service to veterans organizations?"

Many veterans who advance their own claims without representation do so successfully without ever visiting a VARO. Likewise, the effective preparation, presentation, and prosecution of veterans' claims by service representatives is not dependent on their daily presence at a VARO. However, the effective representation of veterans' claims by service personnel not stationed in the VARO would sometimes require the VARO to provide such personnel with copies of an individual veteran's complete record.

A veterans organization's physical presence at a VARO may be economically desirable to the organization, both in terms of costs associated with office space, telephone service, and increased productivity by having ready access to veterans' files. The potential cost to the VA of having to reproduce files, and mail them to service representatives not co-located with the VARO, suggest that making office space and telephone service available to veterans organizations is both cost effective and efficient for the VA.

In some instances, the ability of a veterans organization to successfully represent veterans before the VARO, may even be thwarted by their presence at the VARO. The potential for a VARO to influence an organization that has become economically dependent on the VA for costly office space and telephone service should not be overlooked. Such a potential often leads to a cozy and mutually convenient working relationship between the organization and the VARO. Sadly, veterans often perceive, either correctly or incorrectly, that this overt closeness between their chosen representative and the VARO impedes the organization's ability to aggressively advocate their claim at the VARO.

In response to your specific question, real estate values, the size and population density of an office's service area, all of which differ from location to location, must be considered. Such factors obviously influence the cost of office space and telephone service. Assuming that a service organization would desire to maintain a presence within a VARO, such basic costs could probably be expected to average $24,000 annually for each office. If such an expenses were to be absorbed by the service organizations; we would probably elect to have service personnel work out of their homes or existing VVA offices and compel the VARO to furnish them with copies of all documents they may need to successfully represent their clients.

If you have any further questions we will, of course, be happy to respond.

Sincerely,

Richard E. O'Dell
Vice President

Encl.

CC: Honorable Frank Murkowski

Office of Congressional
and Intergovernmental
Affairs

Washington DC 20420

Veterans
Administration

June 5, 1986

In Reply Refer To

Mr. Jesse G. Ugalde
Director
Department of Veterans Affairs
1227 O Street
Room 206
Sacramento, California 95814

Dear Mr. Ugalde:

In accordance with our desire to maintain close cooperation and liaison with state offices and private agencies serving our nation's veteran community, I am enclosing copies of topical discussion papers recently released by the Veterans Administration which I think will be of immediate interest to you.

Each of these papers address important issues concerning the continued delivery of VA health care, benefits and other services to veterans in the future. The immediate items of discussion and interest are:

1. Consolidated Omnibus Budget Reconciliation Act of 1985 (Public Law 99-272):
    A. Changes in VA Health Care Eligibility.
    B. Recovery of Cost of VA Health Care.
2. Judicial Review: An Overview of VA's Position.
3. H.R. 585 (VA Adjudication Procedure and Judicial Review Act): Impact on VA Adjudication Procedures.

As you know, these concerns have all been high-priority issues among the veteran community for many months. We have a continuing obligation to veterans and veteran service officers to insure that our views, guidelines and methods of operation are clearly understood and widely disseminated in as timely a manner as possible. I am sure you will agree that these point papers adequately serve this purpose.

Page 2.

I would very much like to receive your views on these issues, particularly regarding your ideas on the VA positions as enumerated in these enclosures. Your written comments would be greatly appreciated, or you can contact me or Larry De Meo of my staff at (202) 389-5554. We look forward to hearing from you.

Sincerely,

GAIL A. GOMPF
Director
Intergovernmental Affairs

Attachment

OVERVIEW OF VA's POSITION ON JUDICIAL REVIEW

The Veterans Administration believes that veterans deserve an efficient, just, and compassionate system of dispute resolution. We understand the philosophic appeal of judicial review, which would grant veterans their "day in court." However, H.R. 585, 99th Congress, would sour the already good system to the detriment of all veterans.

Veterans would derive negligible tangible benefit from access to the courts. Under the existing adjudication system, claims for VA benefits can be reviewed, perhaps on multiple occasions, on two separate administrative levels. Claims receive thorough and careful consideration, and all reasonable doubt is resolved in favor of the claimant. Furthermore, internal quality control programs assure that VA decisionmaking is kept to a high standard of accuracy. We are confident that only in rare instances would a court find a VA decision to be arbitrary or and capricious.

Under current practice, VA assists a claimant in developing evidence favorable to establishing eligibility. If the evidence adduced on the claimant's behalf is sufficient to establish entitlement, the claim is allowed. If not, the claimant is advised that available evidence is insufficient

to establish eligibility in the expert opinion of the reviewing panel, which, with respect to disability claims, includes a medical doctor. Imposition of judicial review poses a real risk that this current focus of our administrative process--assisting claimants establish benefit entitlement--will shift to insuring that VA denials withstand judicial scrutiny.

The bill's supporters have the laudable intention of preserving intact this informal and cooperative system, and simply adding another available remedy. What we believe they have not foreseen, and what is central to our opposition to H.R. 585, is that the current system would inevitably be changed for the worse by the mere availability of judicial review in the U.S. District Courts.

Enactment of judicial review would interject an adversary relationship into what has been a cooperative process. As a matter of principle, VA should never be placed in an adversary posture, much less become an opposing litigant, with respect to claimants. The prospect of court scrutiny and repeated challenges to our pro-veteran process would necessarily result in more rigid and formal procedures.

They chase veterans through the Court right now!

145,00 cases against veterans in the last 4 yrs

VA would be thrust into the unaccustomed adversarial role of developing evidence to refute a claimant's contentions in order to assure that the record supports denial of the claim to the satisfaction of a reviewing judge. The Agency would have to document every factor and consideration that led to denial of a claim, that is, "build the record." Each procedural step would have to be recorded, including minor ministerial actions. The professional knowledge of a BVA or Rating Board physician member would have to be set forth in the record in detail and bolstered by additional evidence, such as scientific treatises or journal articles, for the benefit of judges untrained in the medical profession.

This adversarial posture would, conceivably, be most evident in cases in which eligibility turns upon the credibility of a witness, perhaps the claimant himself or herself. If, for whatever reason, VA found the witness' testimony less than persuasive, it could be forced to examine or cross-examine the witness in a manner designed to expose the basis for VA's disbelief. Direct, probing questioning by the rating board or BVA members would be needed to create a "complete" record. This examination, with a view toward withstanding judicial scrutiny, will at a minimum place us in an antagonistic role that renders the process more acrimonious. The assistive relationship with veterans we cur-

rently enjoy would be undermined, and perhaps with it a sense of our mission to help them. In a system so different, no one can forecast with confidence that the attitudes of VA adjudicators, no matter how well-intentioned or trained, will not change as well.

Furthermore, administrative flexibility could be lost. At present, for example, the Agency liberally applies requirements of timeliness, particularity in the filing of appeals, and the proffering of "new and material" evidence to reopen a case. This means the VA often expends extra effort in a host of cases that, technically, do not comply with the rules for obtaining review. With the likely change in our relationship with the veteran after enactment of the bill, increased pressure to handle cases as expeditiously as possible, concern with committing reversible errors in certifying appeals, and the participation of more attorneys, who should be held to a high standard for compliance with such "jurisdictional" rules, the relaxed approach may be expected to change.

The length and formality of personal hearings would increase as more attorneys get involved and as VA is forced to build the record. Hearings may become protracted by extensive briefing, subpoena of treating or consulting physicians, introduction of

circumstantial testimony by friends or family members, and more intensive direct- and cross-examination of witnesses.

Judicial review would also delay the processing of all claims. The perceived need to build the record will require VA to secure additional documentary evidence, time-consuming examinations, and social surveys. The prospect of judicial second-guessing may increase the remanding of cases by the BVA in cases involving only "technical" or otherwise harmless administrative errors. Such delay could reduce the value of awards (future dollars) for successful claimants, and foster demoralization and the perception that the system is unfair.

Moreover, many special considerations currently extended to veterans service organizations may have to be curtailed. The providing of VA space and facilities, informal access to adjudicatory personnel, etc., could be affected by judicial oversight and increased representation by private attorneys.

The uniformity in decisionmaking now provided by relying on a centralized, collegial body like BVA can also be expected to suffer. Vesting review authority in the 94 district courts will result in inconsistent decisions mandated by application of different eligibility and adjudication standards likely to be

developed in the courts. In our view, a veteran's entitlement to benefits is not a matter that varies with geography, and a veteran should not be subjected to a system in which the resolution of a claim may differ depending upon the judicial district in which the veteran resides.

Finally, it should be noted that the participation of attorneys would increase the costs to claimants. The primary purpose of the present limitation on fees is, of course, to preserve a claimant's award of benefits to the maximum extent possible. With modification of the attorney fee provision, attorney participation may be expected to increase, and those who retain counsel will obviously bear a greater expense. For example, liberalization of attorney fee awards in Social Security cases caused lawyer representation to jump from 36.8% in 1977 to 64.2% in 1983.

7

We are also concerned that such representation would become the norm, regardless of whether a claimant actually needs a lawyer. As the U.S. Supreme Court observed in a recent challenge to the attorney fee limitation:

> It is scarcely open to doubt that if claimants were permitted to retain compensated attorneys the day might come when it could be said that an attorney might indeed be necessary to present a claim properly in a system rendered more adversary and more complex by the very presence of lawyer representation. It is only a small step beyond that to the situation in which the claimant who has a factually simple and obviously deserving claim may nonetheless feel impelled to retain an attorney simply because so many other claimants retain attorneys.

Walters v. National Association of Radiation Survivors, _ U.S. _, 105 S. Ct. 3180, 3192 (1985).

In conclusion, we believe the imposition of judicial review might benefit a few individuals, but it would work to the detriment of the great majority of claimants as it formalizes and delays the processing of claims, and alters the cooperative relationship between veterans and the Agency. Veterans now have a fair and impartial forum. Our procedures afford a full opportunity to present all evidence and have it carefully considered. So uniquely beneficent a system should not be jeopardized for the dubious end of guaranteeing a few unsuccessful claimants the opportunity of having their claims again considered -- and probably denied -- in a court of law.

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June 1, 1988

The Honorable Frank H. Murkowski
Committee on Veterans' Affairs
United States Senate
414 Senate Russell Office Building
Washington, DC 20510-6375

Dear Senator Murkowski:

I am enclosing the Association's responses to the four questions you posed in a letter dated May 17, 1988 regarding our written statement in support of judicial review of final decisions of the Administrator of the Veterans' Administration. I would be pleased to provide any additional information you might request.

Sincerely,

Robert D. Evans c.

Robert D. Evans

RDE:saw
6203A

Enclosure

FOLLOW-UP QUESTIONS SUBMITTED BY SENATOR FRANK H. MURKOWSKI TO THE AMERICAN BAR ASSOCIATION IN CONNECTION WITH THE COMMITTEE ON VETERANS' AFFAIRS APRIL 28, 1988 HEARING

MAY 17, 1988

I have had a chance to review your submission dated May 6, 1988. It raises a few questions which I would like you to address.

1. While I agree--and have so stated--that erroneous denial of benefits is disturbing, I find myself puzzled by your hypothetical at page 5 of your submission. As I understand it, you conclude that

> it is hardly a legitimate measure of effective or efficient performance that the great majority of veterans are not displeased with the present arrangements

because one could hypothesize a situation in which a large number of claims were being decided on the basis of affiliation with veterans' services organizations. My question to you is this: Is the obverse true? In other words, do you believe that the Committee should treat generalized complaints about the system as a legitimate measure of ineffective or inefficient performance? What weight, if any, do you think the Committee should give to public perception of the quality of the VA adjudication system?

2. You state that a "significant body of case law" suggests that court review is not precluded under 38 USC 211(a) and seem to imply that the review provided in S.2292 is already available.

I understand that, since 1974, VA determinations--including regulations--have been subject to challenge on constitutional grounds. In addition, the Supreme Court's most recent pronouncement in this area, its decision in Traynor v. Turnage, permits non-constitutional review when a VA regulation conflicts with a subsequently-enacted statute not administered by the VA. However, I read Traynor to continue to preclude review of a VA regulation where the regulation conflicts only with a law — administered by the VA. It certainly does not seem to mandate the routine Administrative Procedure Act review provided in S.2292. I would appreciate your view of the Traynor decision and whether you believe the review which would be provided under S. 2292 is already available.

3. You identify the Section of Administrative Law as the Association section "which sponsored the Association's resolutions" in support of judicial review. Has the Section had an opportunity to review S.2292? If it has, please describe what actions, if any, the Section took and what recommendations, if any, it made. If the Section has not reviewed S.2292, could you please explain why it has not?

4. In light of the current interest in alternative dispute resolution, do you think it is necessarily wise for the Congress to thrust another class of claims into federal courts? Might it not make more sense to establish strict review at the level of decision-making that affects thousands or even millions of claimants--i.e., regulations--while leaving the individual benefit determination in a less formal atmosphere?

1. The American Bar Association agrees that there is an adverse public perception about the quality of the VA adjudication system. This was made evident by the testimony of several witnesses before your Committee on April 28, 1988. The reality of the adverse impact on veterans of being denied judicial review coupled with this adverse public perception has led to the introduction of VA judicial review legislation. This legislation, S. 11 (and S. 2292 as far as it goes) attempts to correct a situation which is considered intolerable by many--the lack of judicial accountability by a major federal agency whose purpose is to provide benefits to our veterans.

   Because we should provide our veterans every opportunity to collect the benefits to which they are entitled, the Association asserts that if a veteran believes his benefits have been improperly denied and he has exhausted all available administrative remedies, then the veteran should have the right to petition for the protection afforded by an independent judicial tribunal. We support S. 11 because it provides for this form of meaningful VA judicial review.

2. We disagree with your characterization that Traynor v. Turnage, 56 U.S.L.W. 4321, April 19, 1988, clarifies that Section 211(a) precludes review of a VA regulation. Justice White, delivering the opinion of the Court, clearly states that "...the cases now before us involve the issue whether the law sought to be administered is valid in light of a subsequent statute whose enforcement is not the exclusive domain of the Veterans' Administration." Id at 4322

   Justice White also addressed the scope of Section 211(a) when he stated, "Section 211(a) insulates from review decisions of law and fact 'under any law administered by the Veterans' Administration'; that is, decisions made in interpreting or applying a particular provision of that statute to a particular set of facts." Id at 4322.

   For additional discussion of case law regarding the availability of judicial review of VA regulations, I refer you to Senate Report 99-100, your Committee's report accompanying S. 367.

   As we stated on Page 10 of our written statement, the Association thinks that statutory clarification of this right is beneficial, but it alone is insufficient because it does not make the VA answerable in a court of law for any individual decision regarding a claim for benefits. Decisions of the Administrator will still only be reviewable within the agency which decided the case in the first place. In order for the VA to operate in the sunshine, VA judicial review of the sort proposed in S. 11 is necessary.

3. Policy positions which are conveyed to Congress must be adopted by the Association's policy-making bodies, the House of

Delegates or the Board of Governors. The House of Delegates represents not only various groups within the Association, but also the legal profession as a whole. Its membership of over 450 comprises delegates elected by lawyers in each state, delegates from every state bar association, the major local bar associations, other national associations of the legal profession, and delegates elected by the ABA Assembly and the sections. The Attorney General and Director of the Administrative Office of the U.S. Courts are members of the House by virtue of their office.

The Association's policy supporting judicial review of decisions of the Administrator of Veterans' Affairs was originally adopted by our House of Delegates in 1958. In response to P.L. 91-376 and subsequent Supreme Court decisions involving VA judicial review, the American Bar Association's House of Delegates in 1977 reaffirmed its support for VA judicial review.

In both instances, the ABA Section of Administrative Law prepared the report calling for VA judicial review and proposed the resolutions which were submitted to and approved by the House of Delegates. It thus became the official policy of the American Bar Association. That position has never changed, and no group--including the Section of Administrative Law--has proposed a different policy. The governing Council of the Administrative Law Section at its April 1988 meeting discussed the introduction of S. 2292 and declined to take any action on the subject.

4. The American Bar Association has been committed to exploring means of alternative dispute resolution (ADR). There are many goals of ADR depending upon the type of dispute involved: to provide quick and effective resolution of disputes, to help the parties find their own solution, to reduce costs. Indeed, the initial means by which VA determinations are made is a type of ADR. However, even where ADR is used, it does not preclude the need for judicial review as a final protection against injustice. The function of judicial review of agency decisions is to provide the best check and balance against abusive agency action. It assures that no agency is above the law and that it is answerable to the courts if it appears to have misused or abused its power. Judicial review of agency decisions protects the very people the agency was created to serve. Judicial review of VA decisions as provided for in S. 11 is necessary to assure that our veterans receive the full amount of benefits due and funded by a grateful Congress.

As our written statement makes abundantly clear, the Association is not proposing wholesale judicial review of every decision of the Administrator of the VA. We only want the veteran who has exhausted all his administrative remedies to have the opportunity to petition an appropriate federal court to correct a decision or interpretation which the veteran has reason to believe clearly exceeds statutory or constitutional authority.

DAC:saw
6203A

Vietnam Veterans of America Inc
2001 S St NW
Suite 700
Washington DC 20009-1125

(202) 332-2700

May 23, 1988

Senator Frank Murkowski
Ranking Minority Member
Senate Committee on Veterans Affairs
SH-202 Hart Senate Office Building
Washington, DC 20510

Hand Deliver

Dear Senator Murkowski:

This will respond to your follow-up questions arising from the April 28, 1988 hearing on judicial review and arising from our response to follow-up questions from Chairman Cranston.

Before directly responding to your questions, it must be stated that we are a bit disappointed in their general tone. Some of your questions carry a clear suggestion that you doubt our integrity by implying that we have either stretched the truth or manipulated our presentation. We will assume you intended no such suggestion.

Your follow-up questions and our responses are as follows:

1. **In your testimony, you stated that the judicial review provided in S.2292 was already available. In support of this proposition, you cited the Supreme Court's recent decision in Traynor v. Turnage. I read Traynor to continue to preclude review where the regulation conflicts only with a law administered by the VA. I would appreciate your view of the Traynor decision and whether you still believe the review which would be provided under S.2292 is already available.**

Response:

VVA still believes the review which would be provided under S.2292 is already available. You state that you read Traynor "to continue to preclude review where the regulation conflicts only with a law administered [exclusively] by the VA."

Traynor did not rule on this issue, however. It only ruled on whether review is already available when the regulation conflicts with a statute administered by agencies in addition to the VA. It answered that question in the affirmative, and therefore

S.2292 would simply restate what is already the law on this issue.

With regard to the issue on which you focus and on which Traynor did not rule, the U. S. Courts of Appeals for the Fourth, Sixth, Eighth, and Ninth Circuits have all ruled that review is already available on this issue as well. The Supreme Court expressly acknowledged these four decisions in footnote 9 by stating that they "have held that Section 211(a) does not bar judicial review of statutory challenges to Veterans' Administration regulations..." If the Supreme Court believed these decisions were wrongly decided, it would have said so.

Your reading of Traynor could perhaps be based on the theory that even though Traynor did not rule on the issue, the language it used indicates that it would have decided that court review is not currently available. The language the Court used, however, strongly indicates the opposite. The Court cited the four Court of Appeals decisions with approval. Moreover, it confirmed the validity of the approach used by the four Circuits -- determining whether "[p]ermitting these cases to go forward will...undermine the purposes of Section 211(a) any more than did the result of Johnson [v. Robinson]." Slip op. at 8.

Challenges to VA regulations do not undermine the purposes of Section 211(a) as identified in Johnson. Accordingly, S.2292's judicial review provisions simply restate the law.

2. **I have had an opportunity to review the survey report, dated April 28, 1988, from Cambridge Survey Research. As you recall, the Survey representative summarized the findings in part by testifying that the results showed that, when given a choice, veterans prefer to change the current system of judicial review by a margin of 3:1. The single question asked in this telephone survey began with the following two sentences:**

    > **With one exception, Americans have the right to take a government agency to court if they disagree with a decision made by that agency. This right, called the right of 'judicial review,' is currently denied to veterans in disputes with the Veterans Administration, known as the VA.**

    As you know, there are numerous Federal statutes prohibiting judicial review in other spheres of government activity, including the Federal Employees Compensation Act and certain

Medicare determinations. Indeed, the testimony of the Veterans Administration indicates that there are 80 such statutes. In light of the facts, I would like to know:

a. Who wrote the question that Cambridge Survey Research propounded? If it was not written by a member of your organization, did VVA have the opportunity to edit the question?

Response:

The drafting of questions by a polling organization, as you are well aware, is always a collaborative effort between the client and the polling firm. The formulation and validity of the judicial review question "propounded" by Cambridge Survey Research was ultimately the responsibility of the polling organization.

We anticipated criticism of a poll result favorable to our position on judicial review based on our organization's well known support for judicial review, however, your question is misdirected. Any questions as to the process of formulation of a question to insure validity should be directed to Cambridge Survey Reasearch.

b. In light of the serious inaccuracy in the premise of the question propounded, what weight, if any, do you believe the Committee should give to the results of the survey?

Response:

This part of question number two alleges a "serious inaccuracy in the premise of the [survey] question" asked. In doing so the very criticism of survey objectivity we anticipated is implied. First of all, while the VA may indeed have testified that some 80 statutes bar judicial review of assorted other agency administrative actions, we have only been able to uncover around 40. In this connection, we have addended to this response an internal VVA document on this subject that you may find instructive.

In any event, given the fact that the wording of the question asked in the poll was assembled by experts in the field and given the further fact that what is alleged to be an inaccurate premise in the question is for all practical purposes accurate, the weight given the poll's result by the committee should be substantial. While some on the committee may be disappointed in the poll's result because of their own opposition to judicial review, the results stand as the only such public opinion sampling on that issue that has ever been undertaken. Those results, whether happily or unhappily, speak for themselves.

c. Again, referring to the survey which you presented at the hearing, the response which indicated support for judicial review read as follows:

> **Veterans should have the right to appeal administrative decisions to the courts. The VA should be subject to the same judicial oversight as every other government agency.**

Do you believe that, with the exception of the Veterans Administration, every government agency is subject to the same judicial oversight? If the answer is 'yes,' I would like to know how that view can be reconciled with the fact that there are, for example, numerous statutes precluding judicial review of various government activities. If your answer is 'no,' I would like to know how you believe that fact effects the validity of the survey.

Response:

The fact that there are "numerous statutes precluding judicial review of various government activities," does not change the reality that the VA is the only agency that is immune, on a wholesale basis, from such judicial oversight. The review of facts in individual benefit determinations is systemically excluded for veterans seeking such determinations before the VA. The next broadest exemption, the Federal Employees Compensation Act (FECA) still does not preclude review of the majority of a federal employee's rights and benefits based on his or her status as a federal employee.

Moreover, if one were to compare the number of administrative actions barred from judicial review in all agencies other than the VA to the number of administrative actions barred within the VA, it is likely that the administrative actions of all agencies other than the VA combined would amount to less than one percent of those in the VA alone. Simply put, there are no other bars to judicial review that affect significant portions of the population as is the case with the bar to judicial review of adverse VA adjudications. That being so we regard as accurate a statement that the VA as an agency is sheltered from judicial review.

3. **In your testimony, you discussed the fact that, when the VA brings an action against a veteran for money, the veteran does not have the right to defend himself. You stated as follows:**

> **In other words, the judge has no choice but to rubber stamp whatever amount of money the VA says the veteran owes even if the veteran can prove conclusively that he does not owe the VA any money.**

Is it not true that no such claim would be brought by the Veterans Administration until the veteran had had an opportunity, within the VA, to exhaust the appellate process?

Response:

If the VA followed its regulations, the veteran would have an opportunity to exhaust the process within the VA.

a. **If your answer is 'yes,' do you mean to imply that a veteran who could prove 'conclusively' that he does not owe the VA any money would nevertheless have no chance of prevailing before the Board of Veterans Appeals?**

Response:

No, we do not mean to, and did not in fact imply that a veteran would have "no chance" of prevailing before the BVA. We did state that if the veteran lost at the BVA, or was given inadequate notice and so never appealed to the BVA, the VA's position is that the judge has no choice even if the veteran can prove his case conclusively.

In many federal court cases, the Department of Justice on behalf of the VA raises section 211(a) to bar the veteran from raising a defense other than mathematical calclulations. See e.g., U. S. v. Brandon, 584 F. Supp 803 (W.D.N.C. 1984)(VA argument rejected). Some courts have actually ruled in favor of the VA on this argument. See U. S. v. Ramsey, 639 F. Supp 1062 (E. D. Tenn. 1982) where the veteran was apparently without counsel.

4. **I have had a chance to review your May 6, 1988 responses to Senator Cranston's follow-up questions. I am deeply disturbed by several allegations in that document and would appre-**

ciate more information.

a. In your response, you discuss the position taken on the issue of judicial review by the National Association of State Directors of Veterans Affairs (NASDVA). You state that, on no less than four occasions beginning in September 1986, NASDVA members have chosen not to take a position on judicial review 'under intense pressure from VA officials during their meetings.' With respect to each such occasion, please describe in detail the precise nature of this 'intense pressure' and identify the VA officials involved.

Response:

During NASDVA's 1986 convention, the state of Virginia, with support from other states, advanced a modest resolution calling for NASDVA to support judicial review of law, regulation and fact in regard to the Veterans Administration. In my capacity, at that time, as an official of the Virginia Division of War Veterans' Claims (DWVC), I represented Virginia during this convention as instructed by the Director of DWVC. During the convention it was my responsibility to aggressively advocate the issue of judicial review with a goal of obtaining NASDVA's support.

A resolution, modified slightly from the original submitted by Virginia, was subsequently adopted by the NASDVA Resolutions Committee and referred to the Convention. Just prior to the debate on the resolution, a leader in NASDVA asked to have a private conversation with me in regard to the judicial review resolution. This conversation, and subsequent conversations with NASDVA members, are considered by me to be confidential and it would be a breach of trust for me to divulge the identity of this NASDVA leader or others who have spoken to me candidly and confidentially. However, sharing with you relevant portions of such conversations does not constitute a breach of confidence since the facts of what subsequently transpired in regard to the NASDVA judicial review resolution speak for themselves.

The substantive points of my 1986 conversation with a NASDVA leader in regard to the judicial review resolution under consideration at the convention were:

- The NASDVA leader prefaced his remarks by stating that he personally believed in judicial review and wished to see its passage. However, he stated that he was seeking my assistance in hopes of pre-empting, as in the overall best interest of NASDVA, a vote on the judicial review resolution.

- * The NASDVA leader also noted that it appeared to him that there was strong and almost equal support among NASDVA's members, both for and against, the judicial review resolution. However, he also indicated that it appeared to him that there was a consensus concern among the directors that the VA, in light of their June 1986 letter to the directors, would not be favorably disposed to continue or expand supportive services provided by them to the state veterans affairs agencies if NASDVA supported judicial review. [As you know, a copy of this letter was attached to my May 6, 1988 response to Senator Cranston, and was discussed in my letter to him.]

- * The NASDVA leader also stated that in his opinion fear of possible VA retribution against the state agencies would result in a negative vote on the judicial review resolution at this time.

- * The NASDVA leader suggested to me that since the issue of judicial review appeared then to be moot for the 99th Congress, there was no benefit to be realized by a NASDVA resolution in support of judicial review. He also felt that the resolution would be defeated and that a more prudent course of action would be to table the issue.

- * Given this information, which was consistent with information already secured from talks with other NASDVA members, an agreement was reached. This agreement called for an open debate on the issue and a motion to table the issue with the stipulation that it be reconsidered during NASDVA's 1987 Mid-Winter Conference.

The NASDVA judicial review resolution was debated, and consistent with my agreement with the NASDVA leader, I moved to table the resolution with the understanding that it be reconsidered the following year during the NASDVA Mid-Winter Conference.

At the 1987 NASDVA Mid-Winter conference the judicial review resolution was again debated and was again tabled. As reported to me by several NASDVA members, it was the sense of NASDVA's members that the resolution needed to be considered at the 1987 NASDVA Convention which would afford more members the opportunity to review and to act on the resolution. Further confidential inquiry with some NASDVA members revealed that there was a pervasive fear of retribution against them by the VA, or older veterans organizations who also opposed judicial review, if NASDVA were to take a position in support of judicial review. In tabling the resolution for the second time a stipulation was made that the issue of judicial review, to include presentations by veterans organizations and other interested parties, would take place during the 1987 NASDVA Convention

At the 1987 NASDVA Convention the issue of judicial review consumed virtually all of the convention's allotted meeting time. Attending this meeting were representatives of nine veterans organizations who addressed the issue of judicial review. Of these, eight organizations opposed comprehensive judicial review and one supported judicial review of law, regulation and fact in regard to adverse VA adjudications. At least one staff member of the House Veterans Affairs Committee, Mr. Patrick Ryan, attended. Also in attendance were the Chairman of the Board of Veterans Appeals, the VA General Counsel and other officials of the VA.

Following the presentations in regard to judicial review at the 1987 NASDVA Convention the issue was moved to a floor vote. A motion was made to again table the resolution. This motion was defeated. A motion was made to take a vote on the resolution and this motion was subsequently amended to require that the vote be taken by roll call. Then, contrary to normal parliamentary procedure and in a most confusing manner, a substitute motion not to vote on the issue was offered and given priority. This substitute motion was voted on and carried as the convention ended. It would appear that the position of NASDVA was then codified as being one of refusing to take a position in regard to the issue of judicial review.

Parenthetically, it should be noted that after the 1987 NASDVA Convention, the House Committee on Veterans' Affairs printed and distributed the text of statements made by veterans organizations at the convention. A copy of this Committee publication is enclosed. Given the House Committee's widely understood strong objections to judicial review, we have to conclude that the Committee's expenditure of resources to print and distribute the NASDVA Convention's proceedings was intended to imply that NASDVA shares the same or simillar objections to judicial review as those of the organizations having made presentations at the convention.

We are unaware of any formal action taken by NASDVA during their 1988 Mid-Winter Conference in regard to judicial review. It has confidentially been reported to us by NASDVA members that the issue of judicial review, and NASDVA's potential for addressing issues of national concern to veterans, will probably be major topics of discussion at the 1988 NASDVA Convention.

In candid and confidential discussions with some NASDVA members, beginning in 1986 and continuing to the present, it has been reported to me that certain VA officials, both at the VACO and VARO levels, have suggested to them that support of judicial review would constitute an adversarial stance against the VA. Such statements have also been reported to be coupled with inferences that such an adversarial position would not be conducive to a harmonious working relationship with the VA. Given the VA's long, but questionable assertion that judicial review would somehow create an adversarial environment for adjudiciations, we must reasonably give credence to such reports. To reveal the names of VA officials divulged to me in the course of such conversations, could compromise the identity of our confidential sources. Also, it is reasonable to expect that VA officials, both at the VACO and VARO levels, will articulate and act on what has been a stated VA position for years.

b. **Again, with regard to NASDVA, you state that, in failing to take a position on judicial review, the members were 'ever mindful of the VA's ability to negatively impact on their agency's operation ....' Do you mean by this statement that the reason NASDVA took no position was due in part to the referenced 'mindfulness'? If your answer is 'yes,' please describe in detail how you came to be aware that this was true and identify the members who made their decision based on this 'mindfulness.' If your answer is 'no,' please explain exactly what you meant by the quoted statement.**

Response:

Yes. The VA's June 1986 letter, referenced earlier in this response and previously provided to you, was obviously designed to foster and encourage such a sensitivity among the state directors. Since this arrogant affront to the autonomy of the state departments of veterans affairs, it has been reported to me by various state directors that there is a continuing fear that the VA will selectively withdraw its tangible and intangible support from these departments if they move to support judicial review. The transparent reasoning on which the reallocation of office space in the Roanoke, Virginia VARO is based, is an example that has not escaped the attention of other state directors of veterans affairs.

c. You state that the Virginia Division of War Veterans' Claims (DWVC) supported judicial review at the September 1986 NASDVA convention, and that, 'immediately following' that convention, DWVC was moved to (apparently) less desirable office space in the Roanoke, Virginia VA Regional Office. You state further that the Disabled American Veterans was given the DWVC space, and report that 'some employees of the DWVC' believe that this change was a direct result of the respective positions of DWVC and DAV on judicial review.

(1) Isn't it true that the relocation of DWVC office space was part of the VARO's compliance with a VA Central Office requirement, beginning in 1985, that the Roanoke Regional Office decrease its size by more than 6500 square feet in order to accommodate the Federal Bankruptcy Court and that all veterans service organizations (VSO's)--as well as VARO personnell [sic]--in the regional office were affected?

Response:

It may be true that the relocation of the DWVC office space has in some fashion been bureaucratically justified to be in compliance with a 1985 VA Central Office requirement. However, such a "justification" simply does not mask the equally transparent and punitive motivation behind the relocation of DWVC within the VARO. The "justification" for the reallocation of DWVC's office space seems to be founded on the 1985 VA Central Office directive requiring the VARO to accommodate the space needs of the Federal Bankruptcy Court. However, we would be remiss if we failed to point out to you that the Federal Bankruptcy Court, neither then nor now, occupies any of the tenth floor VSO office space.

The move did affect all VSO's and some VARO personnel, however, we fail to see the significance of this.

(2) Isn't it true that notification of the space change occurred in March 1987 and that the actual change took place in July 1987, some ten months after the NASDVA convention?

Response:

A notification in regard to the space change, written or otherwise, may have occurred in March 1987, however, since I was not then with the DWVC I cannot comment as to whether this is true or not. However, prior to my departure from DWVC the Division was verbally notified that they would be relocated to a portion of the area then occupied by the VARO's Finance Division, and that a section of the VARO's Veterans Services Division would move into the DWVC space.

The exact date of the first verbal notification of the relocation of DWVC within the VARO eludes me. Yet, with certainty, it was immediately prior to my departure from DWVC, which was in mid-November 1986. To the best of my recollection, DWVC was verbally notified of the relocation immediately after the early November 1986 publication, in the Roanoke Times & World News, of an article highly critical of the VARO. A copy of this article, as subsequently reprinted in the VVA Veteran, is enclosed and is self-explanatory.

In July 1987, I made an informal visit to the Roanoke VARO and observed that the physical relocation of DWVC was in progress. This fact, while true, has no bearing on the underlying motivation for the relocation and is simply indicative of the length of time it took to reconfigure the available office space.

> **(3) Isn't it true that DWVC Director Samuel Black complained to Administrator Turnage of the change in May 1987 and never even suggested that DWVC's position on judicial review was a factor in the VARO's action?**

Response:

I am aware that Mr. Black wrote a letter of complaint to Administrator Turnage in regard to DWVC relocation sometime during the first half of 1987. However, I am not privy to the specific contents of the letter referred to in your question.

Accepting as true, your assertion that Mr. Black did not suggest to Administrator Turnage that DWVC's relocation was in some way related to its support of judicial review; and, noting the speculative nature of your question, there is a speculative observation which we can also make.

Mr. Black, as with other state directors of veterans affairs, neither relies upon the Administrator on a daily basis for direct VA support of his agency, nor would he wish to overly antagonize local VA officials on whom he does rely for direct VA support. Given such a situation, we speculate that Mr. Black probably acted prudently if he chose to argue the administrative underpinnings of the VARO's decision and not the more controversial aspects of the decision's genesis.

(4) Isn't it true that, in 1985, while VA standards called for approximately 180 square feet per VSO employee, DWVC had 247 square feet per employee while DAV had 150 square feet per employee?

Response:

Arguably no. Because of the configuration of office space on the tenth floor of the Poff Federal Building, DWVC appeared to have more office space than other VSO's. However, as I recall perhaps as much as one third of this so-called office space was in fact an open access hallway to the VARO Finance Division. This DWVC "office space" ran approximately two-thirds the length of the entire tenth floor and was, because of safety considerations and the need for access, not actually usable DWVC space. The DAV's office space, which was then located on the eighth floor of the building, was arranged in such a manner that all space assigned to that VSO was in fact space which they could use.

With certainty, I cannot state whether the respective numbers in your question, concerning the square footage assigned, are the same as those discussed in 1986. However, with certainty, DWVC did object to the inclusion of unusable office space in such calculations.

(5) Isn't it true that DWVC and DAV now have approximately the same amount of square footage per employee?

Response:

I do not know with certainty if this is true or not. Since the relocation of DWVC to the back of the tenth floor, and the relocation of the DAV from the eighth floor to the front of the tenth floor, the old open hallway, previously calculated as part of DWVC's office space, has been enclosed and is now a part of the VARO proper. Accordingly, it appears that as far as usable space is concerned DAV has slightly more and the DWVC slightly less, than prior to the relocation.

(6) Please describe in detail any facts you have or know of that support a conclusion that this action repre-

> **sents the VA's 'assignment of office space to punish or reward veterans organizations according to their position on judicial review.'**

Response:

The DWVC relocation in the Roanoke VARO, is clearly a punitive action by the VARO against an agency that seeks to assert it's rightful autonomy in representing, as it deems appropriate, what it believes to be in the best interest of Virginia's veterans and their families.

Such a conclusion is the result of logical reasoning applied to the following chronology of events and the VA's own documents and actions in regard to this situation:

1. A 1985 VA Central Office directive that office space be reduced in the VARO to allow for the expansion of the Federal Bankruptcy Court. For all practical purposes this directive was not acted upon until late the following year and none of the VSO space reallocated was provided to the Federal Bankruptcy Court.
2. A June 1986 VA Central Office veiled threat that the VA would withdraw its support from VSO's supporting judicial review.
3. The fall 1986 verbal notification to DWVC of relocation, transparently justified by the 1985 VA Central Office directive concerning office space, following DWVC's leadership role in support of judicial review at the NASDVA Convention and after an article attributed to the DWVC and highly critical of the VARO had been published.
4. Hypothetically accepting as justified the need to reduce DWVC's allotted office space, there is still no rational explanation to justify its arbitrary relocation to the back of the tenth floor and the subsequent assignment of the DAV to the more prominent space previously occupied by DWVC.

> **(7) You state that '[w]hether [the DWVC employees'] beliefs are true or not is irrelevant given the appearance of the VARO's action in regard to the assignment of office space.' Do you believe that, given its position on judicial review, DWVC should never be given what some of its employees 'believe' to be less desirable office space and that DAV,**

> **given its position on judicial review, should never be given what DWVC believe to be more attractive office space? If the issue is merely one of timing, what period of time, in your opinion, should elapse before the VA is permitted to make changes in space allocation within its Regional Offices.?**

Response:

The DWVC, which represents veterans before the VA in its own name and on behalf of approximately twelve VSO's, and which supports more than twenty independent field offices throughout the Commonwealth of Virginia, has a clientele that far exceeds those of independent VSO's operating at the Roanoke VARO. DWVC, as the predominate veterans service entity in Virginia, has historically occupied the preeminent office space within the VARO as a convenience to those who seek its services. Conversely, the DAV, with a much smaller clientele than DWVC and with its only Virginia based office located in the VARO, has had a less prominent office space.

It should be noted that VA's decision to reallocate office space in the Roanoke VARO's was undertaken at the very time that new regulations, which would preclude such arbitary actions, were in the process of being revised. A copy of these proposed regulations, which would direct the assignment of office space to VSO's be done in a manner that will effecitvely serve more clients, is enclosed.

We believe the assignment of office space to VSO's should not be based on any particular VSO's stated position on any issue either for or against the VA's stated position on the same issue.

The issue, contrary to that implied by your question, is not one concerning the relative "attractive[ness]" of office space allotted to one VSO or the other. The issue is fundamentally one of providing usable office space to those who must work there in a manner that is convenient to the most number of veterans who must access the various offices for assistance. Accordingly, in my opinion it would be inappropriate at anytime for the VARO to reassign office space allotted to VSO's that posed an inconvenience to the veterans who rely upon ease of access to the various offices and who have become familiar with an office's specific location over the years.

Hopefully, these responses have satisfactorily addressed your concerns. Should you have further questions, feel free to contact this office again.

Sincerely,

Richard E. O'Dell
Vice President

Encls.

CC: Senator Alan Cranston

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MEMORANDUM

TO: VVA/VVALS
FR: MW/Legal Interns
RE: Federal Administrative Actions Immune From Judicial Review (The Infamous Forty)

A. Introductory Remarks

It is a mistake to loosely use the term "agency" as being the "thing" which is immune from judicial review. In actuality, it is only certain agency (administrative) action or decisions which are immune. It just so happens that nearly all VA decisions are immune. This may make the reference to the VA as being an "agency" appropriate. It is not appropriate for the other administrative activities listed. For example, decisions by the Secretary of H&HS on whether to approve capital expenditures by provider hospitals receiving Medicaid funds under the Social Security Act are not reviewable by a court (42USC§1320a-1(f)); but, of course, decisions by the Social Security Administration (part of H&HS) affecting awards of benefits to individuals are reviewable. This distinction is important to point out and maintain because nowhere does the limit on judicial review affect as many people as does the VA bar. Use of the term "agency" equates the narrow and esoteric federal administrative actions (list attached) with the VA benefits system, which is broad in scope and affects millions of people.

B. FECA

The Federal Employees Compensation Act (FECA) creates the disability compensation system for all federal civil service employees. Federal workers injured on the job in the course of their duties are compensated by the system. Decisions made pursuant to FECA are not subject to court review. FECA is the only other major federal administrative process (in addition to the VA) immune from judicial oversight.

The claims and appeal process set-up by FECA is similar to the VA system. Claims are submitted to the Office of Worker Compensation Programs (OWCP). Adverse decisions can be appealed to the Employees Compensation Appeals Board (ECAB). Unlike the VA, under the FECA system there is a provision for an additional, direct review by the Secretary of Labor.

Approximately 165 to 170 thousand claims are submitted to OWCP by federal workers each year. Of these, about 2000 go to the appeals board as adverse decisions. Very few of the appeals are reversed. About 20 to 30% may be remanded for further development rather than affirmed outright. The low number of appeals may reflect a high satisfaction rate by federal workers submitting claims. Sources at the OWCP said claims are settled routinely. This may be close to the truth since injuries and claims for compensation are contemporaneous, with less discretion allowed to the FECA administrators in interpreting the facts surrounding an injury.

Specific mention of the bar to judicial review does not appear in the language of FECA until 1945. It is likely, however, that the bar dates from 1916, the date of FECA's inception. In support of this position there is the following: In 1916 there was no widespread use of the courts to review administrative decisions. The Comptroller General was authorized to make independent reviews of the basis for administrative decisions which resulted in monetary expenditures. The legislative history of FECA from 1916 does not mention the issue of judicial review.

FECA was amended in 1924 to specifically bar review by the Comptroller General. The impetus for this action was the occurrence of ongoing disputes between the commission administering FECA and the Comptroller General. Legislative history from this period does mention judicial review, but as a concept only. The debate sheds light on the probable role of the courts prior to this time. One proposal in the Senate was to make decisions by the FECA commission that were "not supported by competent evidence" reviewable by the District of Columbia Court of Appeals. Apparently, this proposal was rejected as too drastic. It did not appear in the final draft of the amendment. One congressman, as he argued against the Senate proposal, lamented the concept of review by the courts by saying that "for the first time it is proposed to provide for review by a court instead of by the Comptroller General. It is the first big step in breaking down the independent review by the Comptroller General."

Reference during the 1924 Congressional debates of "review by the courts" happening (although only potentially) for "the first time" leads one to conclude that no judicial review occurred in FECA cases prior to this date. None occurred afterwards because it was not provided for in the 1924 amendment. And, it is likely no one mentions it in 1916 because it was not comprehended at that time. The Chief Counsel for FECA supports this interpretation. He did not know the legislative history of FECA or the rationale behind the bar to judicial review. He says that "it is just a given that we live with," and that, from what he understands, "the bar to judicial review dates from the 1920s." Additionally, the history of the Administrative Procedure Act (APA) also seems to support this proposition. Widespread use of the courts to review administrative actions did not occur until after 1946, when the APA was first enacted.

C. The Other Provisions

The balance of the forty provisions listed do not compare with the VA or FECA systems. They cover administrative actions that are either very narrow in scope, or very esoteric, or both of these. Many of the provisions with a narrow scope deal with the settlement of claims for damages arising from war-time loss, radiation exposure of Pacific Islanders and nationalization of property of US citizens by foreign governments. Very few people are affected by the bar to judicial review in these situations. The award of research grants by the Secretary under the Automotive Propulsion Research and Development Act of 1978 is not reviewable. Congress thought the subject matter too scientific to allow judges to second guess government scientists about the worthiness of research proposals submitted by other scientists. (No one cares about the bar to judicial review in this case except the scientist who did not get funded to build the first submersible car.) Within the Department of Defense there are examples of administrative decisions that are both narrow and esoteric, and immune from judicial review: who qualifies as a dependent of a servicemember for purposes of receiving medical and dental benefits (10USC§1084), and who can be appointed as a fiduciary of an incompetent servicemember (37USC §604).

At least three of the provisions listed have been repealed.

Some of the provisions have major loopholes in the bar to judicial review. No review of decisions by US consuls to deny visa applications is allowed (8USC§1103(c)), nor are decisions by federal parole boards (18USC§4218(d)); however, in both of these examples the federal courts are not barred from reviewing habeas petitions. One of the listed provisions is completely misleading. The Regional Rail Reorganization Act does not bar judicial review. Rather, it set-up a special court of three circuit level judges to review complaints against the final system plan called for under the Act. Review by any other court was barred. A direct appeal from the special court to the Supreme Court was authorized. Another example is the bar to review of decisions by H&HS to assess and recover delinquent child support payments from parents who have children in the AFDC program. Parents affected by H&HS actions under this provision have access to the state court systems to challenge the assessments of delinquent child support.

Other typical examples of some of the judicial review bars and the rationales behind them are: decisions by the NRC to prohibit export of nuclear production materials (national security/nonproliferation), management decisions by the Secretary of the Interior concerning the Alaska Oil Pipeline (energy crisis), selective service classification of draft registrants (national security).

mans, and I think it is fair to say that at the time of the second drive the American Army saved Paris [applause], because there was apparently nothing else which could halt the onward march of the Germans at that time.

By the time of the third drive we had gotten more soldiers into the trenches—about 150,000—and it brought the Germans no nearer to Paris. In fact, after the mighty collision between the opposing forces the Germans were steadily pressed back until the armistice was signed. I have gone through the Library files of the daily papers which were printed during the time these events occurred to see what news came to the American people. There was no reference at all in the newspapers in telling about the second drive to the fighting done by the Americans until it was all over, and then it was only in a fragmentary way. Some day we will be able to get the history of this war as it happened from day to day. I do not blame anybody for not letting us have the news at the time, because it was known that every newspaper dispatch that got into Switzerland or any of those countries next to Germany that in any way disclosed the location or movement of troops was used by the secret service there to the advantage of Germany. I do not think there was any effort on the part of France or Great Britain to deprive us of any of the glory of the victories won by us. The only reason that sometimes very meager reports came to us as to glorious feats performed by our armies was that if the information had been allowed to go out through the dispatches it would have gotten to the enemy.

A few days after I got home Major Liggett, a Civil War veteran, having heard that I had seen his sons in France, called at my office, and after we had talked over the events of the war, he said, "Mr. Young, I hope our boys will march into Berlin." Said I, "Major, our boys have done a bigger thing than that already. They have stopped the Germans from marching into Paris." [Applause.]

Mr. Speaker, the World War was humanity's battle for humanity, in order that human liberty might be preserved, that universal freedom might be advanced, that the democracy of the world might be safeguarded, that Christianity might survive, and that the world's last and best civilization should not break down. To have had a part in the campaign of the great American army of democracy was "honor enough for mortal."

In a little book written recently by Grace S. Richmond she says, "Man is immortal until his work is done." To those of us who took the great responsibility of voting for war it is a comfort to feel that the great work of every boy whose life was cut off had been done. If the work of Jesus was completed when in early manhood he died on the cross, we can well believe that the work of these splendid young men was done when they made the supreme sacrifice on the field of battle.

The following lines were written as a protest against "I didn't raise my boy to be a soldier," by James D. Hughes, superintendent of education, Toronto, Canada, who gave a son to the cause, who lies somewhere in France:

HIS SOLDIER SON

God gave my son in trust to me:
Christ died for him, and he should be
A man for Christ. He is his own,
And God's and man's; not mine alone.
He was not mine to "give." He gave
Himself that he might help to save
All that a Christian should revere,
All that enlightened men hold dear.
"To feed the guns!" Oh, torpid soul!
Awake, and see life as a whole.
When freedom, honor, justice, right,
Were threatened by the despot's might,
With heart aflame and soul alight,
He bravely went for God to fight
Against base savages whose pride
The laws of God and man defied;
Who slew the mother and her child;
Who maidens pure and sweet defiled.
He did not go to "feed the guns";
He went to save from ruthless Huns
His home and country, and to be
A guardian of democracy.
"What if he does not come" you say;
Ah, well! My sky would be more gray,
But through the clouds the sun would shine
And vital memories be mine.
God's test of manhood is, I know,
Not "will he come?" but "did he go?"
My son well knew that he might die;
And yet he went, with purpose high,
To fight for peace and overthrow
The plans of God's relentless foe.
He dreaded not the battle field;
He went to make fierce vandals yield.
If he comes not again to me,
I shall be sad; but not that he
Went like a man—a hero true—
His part unselfishly to do.
My heart will feel exultant pride
That for humanity he died.
"Forgotten grave!" This selfish plea
Awakes no deep response in me,
For, though his grave I may not see,
My boy will ne'er forgotten be;
My real son can never die;
'Tis but his body that may lie
In foreign land; and I shall keep
Remembrance fond, forever deep,
Because of triumph that he won.
It matters not where anyone
May lie and sleep when work is done.
It matters not where some men live;
If my dear son his life must give,
Hosannas I will sing for him,
E'en though my eyes with tears be dim,
And when the war is over, when
His gallant comrades come again,
I'll cheer them as they're marching by,
Rejoicing that they did not die.
And when his vacant place I see
My heart will bound with joy that he
Was mine so long—my fair young son—
And cheer for him, whose work is done.

[Applause.]

CLAIMS OF CHOCTAW AND CHICKASAW INDIANS

Mr. SNYDER. Mr. Speaker, I present for printing under the rule a conference report on the bill (H. R. 5325) conferring jurisdiction upon the Court of Claims to hear, examine, adjudicate, and enter judgment in any claims which the Choctaw and Chickasaw Indians may have against the United States, and for other purposes.

MINORITY REPORT FROM COMMITTEE ON INSULAR AFFAIRS

Mr. FAIRFIELD. Mr. Speaker, I ask unanimous consent that the minority members of our committee may be permitted to file a minority report on the bill (H. R. 8856) to enable the people of the Philippine Islands to adopt a constitution and form a government for the Philippine Islands and to provide for the future political status of the same.

The SPEAKER. The gentleman from Indiana asks unanimous consent that the views of the minority may be presented. Is there objection?

There was no objection.

AMENDING THE EMPLOYEES' COMPENSATION ACT

Mr. DYER. Mr. Speaker, I desire to call up the conference report on the bill H. R. 7041.

The SPEAKER. The Clerk will report it.

The Clerk read as follows:

A bill (H. R. 7041) to amend an act entitled "An act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes," approved September 7, 1916.

The SPEAKER. The Clerk will read the conference report.

The conference report was read, as follows:

CONFERENCE REPORT

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H. R. 7041), entitled "An act to amend an act entitled 'An act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes,' approved September 7, 1916," having met, after full and free conference have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the Senate amendment and agree to the same with an amendment as follows: On page 2, line 13, after the word "States," strike out the period and insert a colon and the following proviso: "*Provided, however*, That if the Comptroller General upon inspection of the record of any claim in the office of the commission is of opinion and so finds that such claim is not supported by competent evidence and the commission disagrees therewith, the matter in dispute shall be subject to review by the Court of Appeals of the District of Columbia whose decision on the question of competent evidence to support the claim shall be final and binding on the Comptroller General and the commission. Either party to the dispute may bring the question into said court by filing a petition and said court shall compel the other party by subpœna or otherwise to appear, answer, and submit to the decision of the court"; and the Senate agree to the same.

Geo. S. Graham,
L. C. Dyer,
Hatton W. Sumners,
Managers on the part of the House.
Samuel M. Shortridge,
Selden P. Spencer,
T. H. Caraway,
Managers on the part of the Senate.

STATEMENT

The committee of conference on the part of the House agrees to the Senate amendment because of the urgency with which it was supported upon the ground that it was well to have some supervisory power over the findings of the commission. At the same time the Senate conceded such safeguards to their amendment as would prevent any deadlock, such as that which now exists with reference to the operations of the commission. It is provided by the amendment on the part of the House that a court decision may be secured whenever the Comptroller General and the commission remain at variance with regard to any claim, and it has been thought by the conferees that this would govern the matter successfully for the future and prevent the continuance of a conflict between the commission and the Comptroller General to the detriment of the beneficiaries.

Geo. S. Graham,
L. C. Dyer,
Hatton W. Sumners,
Managers on the part of the House.

Mr. CRAMTON. Mr. Speaker, I make the point of order against the report on the ground that the conferees have exceeded their authority. There was only one amendment to the bill by the Senate, and that was the insertion of three or four words. It was the insertion on page 2, line 8, of the words, "if supported by competent evidence." That is the only matter that is in disagreement. The action of the conferees is to accept that amendment as written, but to insert elsewhere in the bill the amendment that has been read by the Clerk. Secondly, the amendment that has been read by the Clerk, if it had been inserted in connection with or as a part of the amendment that was in disagreement, would have been outside their jurisdiction, for the reason that it provides for an appeal to the courts.

There was nothing in dispute in conference which involved any question of participation by the courts in these disputes, so that the amendment itself was not germane to the Senate amendment or to the bill.

The SPEAKER. The Chair will hear the gentleman from Missouri.

Mr. DYER. Mr. Speaker, the amendment of the Senate put in the words "if supported by competent evidence," meaning that the decision of the commission should be final if it were actually supported by competent evidence. The conferees put in the provision which has been read by the Clerk and which provides that if there is a dispute between the comptroller and the commission as to what is competent evidence, that matter may be submitted by either party to the court of appeals for a decision upon that point. That is the only question, and it surely and certainly is within the authority of the managers.

The SPEAKER. The Chair would like to hear the gentleman—leaving aside that point—on the point that it is an extension of language which has already been agreed on by both Houses. As the Chair understands, this does not amend the Senate amendment but inserts an amendment at a different place.

Mr. DYER. It is a limitation upon the Senate amendment.

The SPEAKER. That may be the effect, but it is not actually the fact.

Mr. DYER. It is undoubtedly so, Mr. Speaker, because if it should be left as the Senate amended it, it would then be a question of who should decide what is competent evidence. We provide that in case there is a question as to what is competent evidence, then it shall be submitted by either party to some one, which, in this instance, is the court of appeals. There is no question but what that is fully and completely within the authority of the conferees.

The SPEAKER. The Chair is ready to rule. The Senate inserted an amendment of a few words. In conference that amendment was accepted, but an additional provision was inserted, not as an amendment to the Senate amendment but as an amendment to the original text several lines below. Whether it is germane or not, and whatever might be the Chair's original opinion if there were no precedents, the Chair thinks the precedents abundantly establish the fact that conferees are very closely limited and that they must not add anything to words which have already been agreed upon by both Houses. In this case, it seems perfectly clear to the Chair, the amendment is put in at a different place and affects language not connected with the Senate amendment. It is put in at a place which is different, and therefore changes the language which has already been agreed upon by both Houses.

Mr. VAILE. I do not think the Speaker is quite accurate in saying that this language has been agreed upon by both Houses. The Senate put in an amendment which has not been agreed upon by both Houses.

The SPEAKER. No; but the language where this amendment is inserted had been agreed upon by both Houses.

Mr. VAILE. But the amendment which is now inserted has the effect of limiting the Senate amendment.

The SPEAKER. That may be, but, as the Chair has stated, if it were an original question the Chair might consider that phase of it, but it has been settled by several decisions that an amendment must amend the language that is inserted. Therefore the Chair feels obliged to sustain the point of order.

Mr. CRAMTON. Mr. Speaker, if the gentleman from Missouri will permit, I move that the House recede and concur in the Senate amendment.

The SPEAKER. The gentleman from Michigan moves——

Mr. GARRETT of Tennessee. Does not the gentleman think it would be better to insist and go back to conference?

Mr. CRAMTON. I am in entire sympathy with the Senate amendment.

Mr. GARRETT of Tennessee. Well, there may be some who are not.

Mr. CRAMTON. That is a question for debate.

The SPEAKER. The gentleman from Missouri would be entitled to the floor.

Mr. CRAMTON. I understand that.

The SPEAKER. The gentleman from Michigan moves that the House recede and concur in the Senate amendment.

Mr. DYER. Mr. Speaker, I move to concur by adding the provision which the conferees have agreed upon.

The SPEAKER. By adding it to the Senate amendment?

Mr. DYER. Yes.

The SPEAKER. The Clerk will report the motion made by the gentleman from Missouri.

Mr. CRAMTON. Mr. Speaker, I make a point of order against the motion.

Mr. LONGWORTH. Mr. Speaker, a parliamentary inquiry.

The SPEAKER. The gentleman will state it.

Mr. LONGWORTH. I am not absolutely certain of my ground, but it occurs to me that under the circumstances this must go back to conference.

The SPEAKER. No. The raising of a point of order against a conference report practically ends the conference, and ends the jurisdiction of the conferees.

Mr. GARRETT of Tennessee. But the bill is not before us.

Mr. LONGWORTH. Is it only the conference report that is before us.

Mr. GARRETT of Tennessee. Yes.

Mr. SANDERS of Indiana. Is that true when the Senate has not yet acted upon it?

Mr. BEGG. Mr. Speaker, the point exactly that is raised here was raised in connection with the agricultural bill that had the emergency rent act on it six years ago, and the conference report was held out of order on a point of order, because I definitely remember having made it, and it was necessary in that case to go back to conference. That was the procedure at that time.

The SPEAKER. The Chair is ready to rule. The Chair does not think it necessary to go to conference. The conference report has been disagreed to. Therefore, the bill with the Senate amendment came up in the House. The House can send it back to conference or can act directly on the Senate amendment.

Mr. CRAMTON. The bill had to be with the papers and is before the House. I make a point of order against the motion of the gentleman from Missouri.

The SPEAKER. The Clerk will report the motion of the gentleman from Missouri.

The Clerk read as follows:

Mr. Dyer moves to recede and concur in the Senate amendment with the following amendment: At the end of the matter inserted by the

Senate amendment add: "*Provided however*, That if the Comptroller General upon inspection of the record of any claim in the office of the commission is of opinion and so finds that such claim is not supported by competent evidence and the commission disagrees therewith, the matter in dispute shall be subject to review by the Court of Appeals of the District of Columbia whose decision on the question of competent evidence to support the claim shall be final and binding on the Comptroller General and the commission. Either party to the dispute may bring the question into said court by filing a petition, and said court shall compel the other party by subpœna or otherwise to appear, answer, and submit to the decision of the court."

Mr. CRAMTON. Mr. Speaker, I make a point of order against that, the same point of order that was formerly made. It is the same language, and my contention is, first, that the House at this stage of the proceedings has no greater authority than the conferees with reference to matter that is in disagreement between the two bodies and that the language having been agreed upon by both bodies, at that part of the bill where the amendment is proposed to be inserted, new language at that point can not be taken up now; and second, of course I renew the point further that the amendment is not germane to the bill or to the amendment that is in disagreement.

The SPEAKER. The Chair would suggest, to save the time of the House, that this matter be deferred so that the Chair may have an opportunity to examine the bill and decide whether it is germane or not.

Mr. CRAMTON. In connection with that, Mr. Speaker, I would like this one further minute so that the Speaker may have the situation before him. The existing law gives full authority to the comptroller to pass upon the legality of proposed expenditures. There came a controversy between the comptroller and the compensation commission as to certain payments. The bill as passed the House proposed to give much fuller authority to the compensation commission than it previously had. It meant to take from the comptroller review of certain decisions by the commission. The Senate inserted the words that the decision of the compensation commission, "if supported by competent evidence," in that event should not be subject to review by any other administrative or accounting officer, employee, or agent of the United States; that is to say that, "if supported by competent evidence," the decision could not be reviewed by the Comptroller General.

Mr. DYER. Will the gentleman yield?

Mr. CRAMTON. In just a moment. The further amendment that the gentleman from Missouri is presenting brings in entirely a new proposition; that is to say, it proposed that if a decision is made by the commission and that decision is not supported by competent evidence, in that case the review shall not be by the Comptroller General but shall be by a court. In other words, for the first time it is proposed to provide for a review by a court instead of by the Comptroller General. It is the first big step in breaking down the independent review by the Comptroller General.

Mr. GARRETT of Tennessee. Mr. Speaker, I ask for the regular order. The Speaker has requested, and I think very properly, that the matter be deferred.

Mr. DYER. I do not think that the statement of the gentleman from Michigan should go into the RECORD, unfair as it is, without an opportunity to reply to it.

Mr. CRAMTON. I think the Speaker has a perfect right to receive such argument as he wishes before taking the matter under consideration.

Mr. SUMNERS of Texas. Mr. Speaker——

The SPEAKER. The Chair would prefer, simply to save time, that this should be deferred.

Mr. SUMNERS of Texas. Mr. Speaker, I do not like to insist, but if I may have a minute and a half——

The SPEAKER. The Chair thought we would save time by discussing this outside of the House, but if the gentleman insists——

Mr. SUMNERS of Texas. No, sir; I do not insist, but I am a member of the Judiciary Committee——

The SPEAKER. The Chair will hear the gentleman for a minute and a half.

Mr. SUMNERS of Texas. Mr. Speaker, it will be observed from an examination of the bill that the amendment offered by the Senate provides that the matter shall not be subject to review if it is supported by competent evidence. That is an addition made by the Senate. The Chair will observe upon an examination of the conference report that the only thing dealt with in the addition criticized is to provide a tribunal where the one question as to whether or not the evidence is admissible is to be dealt with. This is perfectly germane, because the Senate amendment provided no tribunal where the question could be examined, and the added words in the conference report simply provide a tribunal where that one question alone can be acted upon.

The SPEAKER. The Chair will take the question under consideration.

LEGISLATION BEFORE CONGRESS

Mr. BRAND of Georgia. Mr. Speaker, I ask unanimous consent to extend my remarks in the RECORD on legislation before Congress.

The SPEAKER. The gentleman from Georgia asks unanimous consent to extend his remarks in the RECORD on legislation before Congress. Is there objection?

There was no objection.

Mr. BRAND of Georgia. Mr. Speaker, under unanimous consent of the House of Representatives granted to extend my remarks I insert a compilation of my record upon some of the legislation of major importance that has been submitted to Congress for its consideration, which is as follows:

I voted against the settlement made with Great Britain—whereby the payment of the indebedness due the United States of over $4,000,000,000 was postponed for 62 years and the rate of interest reduced from 4¼ per cent to 3 per cent. This debt was for money loaned Great Britain by the United States, for which the latter held a written obligation to pay the same with 4¼ per cent interest thereon. Notwithstanding the debt was due, the payment of it was postponed for 62 years, and the rate of interest reduced from 4¼ to 3 per cent per annum, which, in my judgment, was unjust to the taxpayers of the country.

I believe I am the first officeholder in Georgia who sounded the alarm against the efforts to bring about a cancellation of the $11,000,000,000 indebtedness due us by the European nations to which I am still unalterably opposed.

Voted against the Esch-Cummings bill, under the operation of which passenger and freight rates were increased to such a point as to become oppressive.

I signed the petition to bring out of the Interstate Commerce Committee, to be considered in the House, House bill 5427, the purpose of which is to reduce freight and passenger rates.

Voted to bring out of the committee to be considered by the House, the Barkley-Howell bill, which had for its purpose the repeal of one of the objectionable features of the Esch-Cummins bill, which many think would be the entering wedge for legislation providing for reduction of freight and passenger rates.

Introduced a bill repealing all laws now in force which deprive the several States of the United States of the right to fix freight and passenger rates within the territorial limits of the State. I could not get a hearing upon this bill by the Interstate Commerce Committee.

Voted against the Fordney tariff bill, which increased the cost of everything one has to buy, whether luxuries or the necessities of life, and which taxes everything from the clothes of the infant in its mother's arms to the robes which shroud the dead.

Voted against the Cape Cod resolution, which provides that the Government shall take over the Cape Cod Canal Corporation, a corporation alleged to be bankrupt and owned by J. P. Morgan, the passage of which will result in a loss to the Government of over $11,000,000.

Voted against the bill canceling the $6,000,000 indebtedness due by China to the United States. This debt grew out of the Boxer rebellion in 1900, which was organized for the purpose of killing every foreigner, including every Christian, and destroying their temples of worship. It is an established historical fact that this rebellion was not only approved but supported by the Chinese Government, and yet this debt is to be canceled when China acknowledges she owes the debt, regards it as an honest debt, and has not even asked that it be canceled.

Voted against the joint resolution giving Germany $10,000,000.

Voted against the child-labor amendment.

I did vote against the McNary-Haugen bill, the same being a farm-product price-fixing proposition, including cotton, inaugurated by western Republicans. The ratio price for cotton under the terms of this bill would only be 18 cents per pound. After much difficulty cotton was eliminated from it.

Voted for the immigration bill, which excludes all undesirable immigrants, including the Japanese. The passage of this bill deeply wounded the Japanese pride, it being part of their religion that they are a superior race to our people. The situation at present is more or less serious.

Voted for the prohibition amendment to the Constitution. Voted for the law to enforce this amendment, and all laws thereafter submitted for its enforcement. There are now pending at

Appendix
(current through 95th Congress)

I. Statutes containing explicit language precluding review of administrative action

A. Distribution of benefits, loans, grants and awards

38 U.S.C. §211(a) - Veterans' Administration

". . . decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors . . . no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise."

5 U.S.C. §8128(b) - Federal Employees Compensation Act

Secretary of Labor's action in allowing or denying compensation for work-related injuries to federal employees —
"not subject to review by another official of the United States or by a court by mandamus or otherwise."

42 U.S.C. §1715 - War Risk Hazards Compensation Act

action of Secretary of Labor in denying or allowing payments under the FECA, which is applicable to the War Risk Compensation Act, is not reviewable by same language as in 5 U.S.C. §8128(b).

22 U.S.C. §1623(h) - International Claims Settlement Act of 1949

action of the Foreign Claims Settlement Commission in allowing or denying claims by U.S. citizens under the Act against foreign governments for taking their property —

"not subject to review by the Secretary of State or any other official, department, agency, or establishment of the United States or by any court by mandamus or otherwise."

22 U.S.C. §1641m - same language is used to preclude review of the Commission's actions in denying claims against Bulgaria, Hungary, Rumania, Italy and the Soviet Union.

50 U.S.C. App. §2010 - precludes review of the Commission's action in approving or denying claims of specific groups incurring physical or property losses as the result of certain U.S. conflicts.

50 U.S.C. App. §2020 - Micronesian Claims Act of 1971 (terminated August 3, 1976).

settlements and payments made by the Micronesian Claims Commission regarding claims of compensation for losses incurred by Micronesians during World War II are "not subject to review."

P.L. 95-134, 91 Stat. 1160, Oct. 15, 1977, §105 -

determinations by the Secretary of Interior that portions of awards made pursuant to Titles I and II of the Micronesian Claims Act are interest and are therefore excluded from payment amounts "shall not be subject to judicial review."

P.L. 95-134, 91 Stat. 1159, Oct. 15, 1977, §104(d) -

decisions by the Secretary of Interior to make payment to individuals or their heirs or legatees, who were residents of certain atolls in the Marshall Islands on March 1, 1954 as compensation for effects of the thermo nuclear explosion which occurred at Bikini Atoll on that date are "not subject to review by any other officials of the United States, or by any court by mandamus or otherwise."

10 U.S.C. §1084 -

Secretaries' of Defense and Health, Education and Welfare decisions concerning eligibility for certain benefits and services offered to dependents of military personnel for purposes of medical or dental care

"may not be reviewed in any court or by the General Accounting Office, unless there has been fraud or gross negligence."

37 U.S.C. §403(h) -

Secretary of Defense's determinations with regard to administration for basic quarters allowances for enlisted personnel, including questions of dependency and relationships,
"not subject to review by any accounting office of the United States or a court, unless there is fraud or gross negligence."

37 U.S.C. §604 - designations by the Secretary of Defense as to whom may be paid amounts due a member of the uniformed services for his use or benefit, when that member is mentally incompetent to manage his affairs
"not subject to review by an official of the United States or a court"

42 U.S.C. §3374(f) - Demonstration Cities and Metropolitan Development Act of 1966

determinations and decisions regarding payments and conveyances, the terms and conditions under which they are approved or disapproved, regarding title to property, eligibility for compensation, amounts payable and administration of the transactions, in acquiring title to, holding, managing, disposing of or reimbursing for losses upon private sale of residential property at or near a military installation closed by the Department of Defense, when owned by an employee of the installation "shall not be subject to judicial review."

12 U.S.C. §1735b(c) - National Housing Act

Secretary of Housing and Urban Development's decisions regarding expenditures to correct or reimburse for structural or other major defects in mortgaged homes that are federally insured "shall not be subject to judicial review."

38 U.S.C. §1827(b) - Veteran's Administration

Administrator's decisions regarding payments or expenditures and terms and conditions of such for correcting structural defects seriously affecting the livability of dwellings inspected during construction by VA or FHA, claims arising from such defects, or acquisition of title to such property, where it is encumbered by a mortgage made, guaranteed or insured under certain federal statutes "shall not be subject to judicial review."

20 U.S.C. §1132e-2(a) -

Financial transactions of the Commissioner of Education in carrying out a program of loans and insuring thereof to institutions of higher education for construction, reconstruction or renovation of academic facilities "shall not be reviewable by any court."

42 U.S.C. §1320a-1(f)-Social Security Act -

determinations by Secretary of Health, Education and Welfare to exclude federal payments for capital expenditures by state health care facilities under Medicare and Medicaid where the Secretary determines the expenditures were unnecessary "shall not be subject to administrative or judicial review."

42 U.S.C. §1320c-30(d)(3)(A) - Social Security Act

determinations by Secretary of HEW to suspend a PSRO's (Professional Standards Review Organization) authority when the Secretary decides that the actions of the PSRO have had unreasonable and detrimental impact on total State expenditures "shall not be subject to judicial review."

P.L. 95-291, 92 Stat. 308, Sec 4(c) (95th Cong. 2d Sess., June 12, 1978) -

determinations and findings of the Secretary of HEW regarding reimbursement to the States for expenditures regarding services rendered by the States under the Social Security Act

"No court of the United States has jurisdiction to entertain any action seeking the review of any determination or finding of the Secretary under this Act, or otherwise seeking to compel a determination by the Secretary to certify for payment any claim described by the first section of this Act."

26 U.S.C. §6305(b) - Social Services Amendments of 1974

Secretary of the Treasury shall assess and collect amounts certified by the Secretary of HEW as child support payments assigned to a state by a parent in an AFDC family for purposes of collection from a deserting parent.

"No court of the United States, whether established under article I or article III of the Constitution, shall have jurisdiction of any action, whether legal or equitable, brought to restrain or review the assessment and collection of amounts by the Secretary under subsection (a), nor shall any such assessment and collection be subject to review by the Secretary in any proceeding. This subsection does not preclude any legal, equitable, or administrative action against the State by an individual in any State court or before any State agency to determine his liability for any amount assessed against him and collected, or to recover any such amount collected from him, under this section."

15 U.S.C. §2703(f)(3) - Automotive Propulsion Research and Development Act of 1978

Secretary of Energy must certify each contract, grant or project made under the program for development of advanced automobile propulsion systems. The certification attests that a project, etc., meet certain requirements and discusses the relationship of the proposed research to related industry research.

"The provisions of chapter 5 of Title 5 shall not apply to certifications and no court shall have any jurisdiction to review the preparation or adequacy of such certification;"

22 U.S.C. §1641p(b) - Foreign Claims Settlement Commission

decision to grant a petition for remuneration to agents, attorneys or representatives of claimants, for services rendered in connection with claims, that asks for an amount in excess of 10% of total amount paid on a claim

"The determination of the Commission in ruling upon such petition shall be within the sole discretion of the Commission and shall not be subject to review by any court."

18 U.S.C. §4218(d) - Parole Commission and Reorganization Act

Actions of the U.S. Parole Commission granting or denying applications and recommendations for parole, imposing conditions on parole orders and modifying or revoking parole orders "shall be considered actions committed to agency discretion for purposes of section 701(a)(2) of title 5."

B. Management of publicly - owned resources.

42 U.S.C. §4602(a) - Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970

guidelines for acquisition of real property by agreement with owners, as offered in 42 U.S.C. §4651, "create no rights or liabilities and shall not affect the validity of any property acquisitions by purchase or condemnation."

43 U.S.C. §1611(b) - Alaska Native Claims Settlement Act

the actions of the Secretary of the Interior and Alaska Regional Corporations in allocating land among villages are "not subject to judicial review"

43 U.S.C. §1652(d) - Trans-Alaska Pipeline Authorization Act

". . . the actions of the Federal officers concerning the issuance of the necessary rights-of-way, permits, leases and other authorizations for construction and initial operation at full capacity of said pipeline system shall not be subject to judicial review under any law except that claims alleging the invalidity of this section may be brought within sixty days following November 16, 1973, and claims alleging that an action will deny rights under the Constitution of the United States, or that the action is beyond the scope of authority conferred by this chapter, may be brought within sixty days following the date of such action. A claim shall be barred unless a complaint is filed within the time specified."

C. Policy decisions concerning achievement of certain national goals

45 U.S.C. §522 - Rail Passenger Service Act

The Secretary of Transportation's report designating the "basic system" of intercity rail passenger service is reviewed by the ICC, State Commissions, and representatives of the railroads and labor organizations. The Secretary is to give any comments and recommendations made in this review "due consideration" when making his final report to Congress.

"The basic system as designated shall become effective for the purposes of this chapter upon the date the final report of the Secretary is submitted to Congress and shall not be reviewable in any court."

45 U.S.C. §718(d)(2) - Regional Rail Reorganization Act

action of the U.S. Railway Association, a nonprofit incorporated association founded in accordance with the Act, in modifying the final system plan upon petition by a State is "not subject to review by any court."

45 U.S.C. §718(d)(3)(C) - modifications or additions for certain brief periods to designations of rail properties under the final system plan are "not subject to review by any court."

45 U.S.C. §719 - exclusive method of review of the final system plan

may only be reviewed with respect to the value of rail properties to be conveyed and the value of consideration received. This review is to be done by a "special court" (3 judge district court), whose determinations may not be reviewed, except for their final order, which may be reviewed only by the Supreme Court if certiorari is requested within a certain period of time.

45 U.S.C. §852(c) -

All orders of the Operations Review Panel, which represents users of the Northeast Corridor rail transportation facilities, are "not subject to review by any court"

50 U.S.C. §47d(b) -

determinations of the Attorney General as to whether a person furnishing information concerning atomic weapons and special nuclear materials is entitled to a reward and the amount to be paid, when made after consultation with the Atomic Energy Commission, and with the approval of the President when the reward is more than $150,000, are final and conclusive and "no court shall have power or jurisdiction to review" them

42 U.S.C. §2155(a)(2) - Nuclear Non-Proliferation Act of 1978

A decision by the NRC not to make certain narrow findings regarding export licensing procedures for special nuclear materials is not subject to review.

42 U.S.C. §2160a -

"No court or regulatory body shall have any jurisdiction under any law to compel the performance of or to review the adequacy of the performance of any Nuclear Proliferation Assessment Statement called for in this Act or in the 1954 Act."

50 U.S.C. App. §1216(a)(6) - Renegotiation Act of 1951 (now terminated)

Regulations designating classes and types of defense contracts which are exempt from provisions regarding excessive profits, and determinations that a contract is or is not exempt under the regulations "shall not be reviewed or redetermined by the Tax Court or by any other court or agency."

42 U.S.C. §1973b(b) - Voting Rights Act of 1965

determinations by the Attorney General and the Director of the

Census which lead to the inclusion of states or political subdivisions in the coverage of §1973b,d,k "shall not be reviewable in any court."

0 U.S.C. App. §460(b)(3) - Selective Service System

> ". . . No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title . . ., after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: Provided, that such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards and the President only when there is no basis in fact for the classification assigned to such registrant."

8 U.S.C. §1105a(b) - Immigration and Nationality Act of 1952

> "(b) Notwithstanding the provisions of any other law, any alien against whom a final order of exclusion has been made heretofore or hereafter under the provisions of section 1226 of this title or comparable provisions of any prior Act may obtain judicial review of such order by habeas corpus proceedings and not otherwise."

8 U.S.C. §1503(c) -

> 8 U.S.C. Sec. 1503(b) authorizes that certificates of identity may be issued by a diplomatic or consular officer of the United States in a foreign country to a person who claims a right or privilege as a United States' national and is denied the right or privilege by a department, agency or official thereof upon the ground that he is not a national. 8 U.S.C. Sec. 1503(c) provides that a person issued a certificate of identity under Sec. 1503(b) may apply for admission to the United States. Sec. 1503(c) states:
>
>> "A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise."

D. Presidential actions with regard to foreign affairs

49 U.S.C. §1486(a) - Federal Aviation Program

orders concerning foreign air carriers subject to the approval of the President under 49 U.S.C. §1461 are not subject to review

B. Statutes whose language and legislative history have been interpreted by the courts to imply preclusion of judicial review under 5 U.S.C. §701(a)(1)

A. Benefits

42 U.S.C. §405(g) - Social Security Act

no judicial review of a decision by the Secretary of HEW not to reopen a previously - adjudicated claim for benefits

Califano v. Sanders, 430 U.S. 99 (1977)

42 U.S.C. §405(h) - Social Security Act

where it has been incorporated in another act without its corresponding provision 42 U.S.C. §405(g).

42 U.S.C. §1395ll
42 U.S.C. §1395oo
42 U.S.C. §1395u(b)(5)

*See full report for a discussion of the case law on this provision

31 U.S.C. §242 - Military Personnel and Civilian Employee's Claims Act

settlement of claims by military or civilian personnel for damages to or loss of personal property incident to service

Macomber v. U.S., 335 F. Supp. 197 (D.R.I. 1971)

B. Emergency determinations in safety regulation

7 U.S.C. §135b(c),(d) - Federal Insecticide, Fungicide and Rodenticide Act

emergency actions by the Administrator concerning registration of economic poisons

NorAm Agricultural Products Inc. v. Hardin, 435 F.2d 1151 (7th Cir. 1970)

7 U.S.C. §1138 - Sugar Act

Secretary of Agriculture's findings in particular rate proceedings and the hearing upon which such findings are based
Mario Mercado e Hijos v. Benson, 231 F.2d 351 (D.C. Cir. 1956)
Casares v. Knebel, 557 F.2d 828 (D.C. Cir. 1976)

49 U.S.C §1429(a) - Federal Aviation Act of 1958

FAA Administrator's summary suspension of an airworthiness certificate when he finds the existence of an emergency

Morton v. Dow, 525 F.2d 1302 (10th Cir. 1975) prosecution of a claim, may be reimbursed for that expense by the claimant. However, prior to demanding or accepting such reimbursement, the agent, attorney, or person must submit a sworn itemized statement of the expense to the VA, and reimbursement of the expense must be approved by the District Counsel, or the District Counsel's designee. The statement of expense and a copy of the District Counsel's determination will be retained in the claims folder as part of the permanent record. Notice of the action taken shall be transmitted to the requestor by the service handling the claim. (38 U.S.C. 3404).

11. Section 14.635 is revised to read as follows:

§ 14.635 Reconsideration of denial of fees and expenses.

A request for reconsideration of a denied fee, or statement of expenses, must be received by the General Counsel within 1 year of the date of denial. If agreement cannot be reached and a hearing is requested, a hearing officer will be appointed by the Director of the regional office involved. The hearing officer shall not be from the Office of the District Counsel. The hearing officer will have authority to administer oaths. A member of the District Counsel's office will present the evidence. The complainant will have a right to counsel, to present evidence, and to cross-examine witnesses. Upon request of the complainant, an appropriate VA official designated in § 2.1 of this title may issue subpoenas to compel the attendance of witnesses and the production of documents necessary for a fair hearing. The hearing shall be conducted in an informal manner and court rules of evidence shall not apply. Testimony shall be recorded verbatim. Within 10 working days after the close of the hearing, the hearing officer shall submit the entire hearing transcript, any pertinent records or information, and a recommended finding to the District Counsel, who will immediately forward the entire record to the General Counsel for decision. The decision of the General Counsel is final. (38 U.S.C. 210(c), 3404)

12. Section 14.637 is revised to read as follows:

§ 14.637 Office space and facilities.

The Administrator may furnish office space and facilities, if available, for the use of paid full-time representatives of recognized national organizations for purposes of assisting veterans in the preparation, presentation, and prosecution of claims for veterans' benefits and no other purpose.

(a) Request for office space should be made by an appropriate official of the organization to the Director of the VA facility in which space is desired and should set forth:

(1) The number of full-time paid representatives who will be permanently assigned to the office;

(2) The number of secretarial or other support staff who will be assigned to the office; and

(3) The number of claimants for whom the organization holds powers of attorney whose claims are within the jurisdiction of the facility or who reside in the area served by the facility, the number of such claimants whose claims are pending, and the number of claims prosecuted during the previous three years.

(b) When in the judgment of the Director office space and facilities previously granted could be better used by the VA, or would receive more effective use or serve more claimants if allocated to another recognized National organization, the Director may withdraw such space or reassign such space to another organization. (38 U.S.C. 3402).

[FR Doc. 87-5773 Filed 3-17-87; 8:45 am]

BILLING CODE [illegible]

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[AD-FRL-3170-1]

Standards of Performance for New Stationary Sources—Amendment of Method 5F

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed Rule and Notice of Public Hearing.

SUMMARY: This proposal would amend Method 5F to add an alternative analysis procedure. The alternative test procedure would require a much lower capital outlay than the current analytical procedure. This would increase the number of laboratories that would have the capability of performing Method 5F analyses.

DATE: *Comments.* Comments must be received on or before June 1, 1987.

Public Hearing. If anyone contacts EPA requesting to speak at a public hearing by *April 8, 1987*, a public hearing will be held on *May 4, 1987* beginning at 10:00 a.m. Persons interested in attending the hearing should call the contact mentioned under ADDRESSES to verify that a hearing will be held.

Request to Speak at Hearing. Persons wishing to present oral testimony must contact EPA by *April 8, 1987*.

ADDRESSES: *Comments.* Comments should be submitted (in duplicate if possible) to: Central Docket Section (LE-131), Attention: Docket Number A-86-17, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

Public Hearing. If anyone contacts EPA requesting a public hearing, it will be held at EPA's Office of Administration Auditorium, Research Triangle Park, North Carolina. Persons interested in attending the hearing or wishing to present oral testimony should notify Mr. Gary McAlister, Emission Standards and Engineering Division (ESED), Emission Measurement Branch (MD-19), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone number (919) 541-2237.

Docket. Docket No. A-86-17, containing supporting information used in developing the proposed rulemaking, is available for public inspection and copying between 8:00 a.m. and 4:00 p.m., Monday through Friday, at EPA's Central Docket Section, West Tower Lobby, Gallery 1, Waterside Mall, 401 M Street SW, Washington, DC 20460. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Mr. Gary McAlister or Mr. Roger T. Shigehara, Emission Measurement Branch (MD-19), Emission Standards and Engineering Division, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone number (919) 541-2237.

SUPPLEMENTARY INFORMATION:

I. The Rulemaking

After the proposal of Method 5F on May 29, 1985 (50 FR 21863), we received a comment requesting that the barium-thorin titration procedure be included in the method as an alternative analytical method. The primary reason for the request was the substantially lower capital cost of the equipment used in the titration procedure as opposed to the cost of the ion chromatograph currently specified in Method 5F. We have completed the necessary development work to allow the use of the titration procedure as an alternative to the ion chromatograph, and are now proposing to amend Method 5F to include this alternative analysis procedure.

This rulemaking does not impose emission measurement requirements beyond those specified in the current regulations nor does it change any

VETERAN'S SUICIDE TIED TO COMBAT DUTY

Rose Ragland's Journey To Justice

A distinguished cadet, a gung-ho Airborne Ranger, an officer, a gentleman ... a victim of the war

BY TIM ORWIG

Michael Joseph Ragland was a casualty of the war that followed him home.

A distinguished cadet on the regimental staff at Virginia Military Institute (Class of 1969), a gung-ho Airborne Ranger decorated for combat service as an infantry officer in Vietnam, Ragland came back to the world in 1971 dreaming of medical school and a happy-ever-after life with his pretty bride, Rose.

In less than a year, his dream of success became a nightmare of failure. Like thousands of soldiers of his generation, he was ambushed by the ghost of Vietnam.

On Aug. 11, 1972, Ragland, 25, fired the last round of his war—a fatal shotgun blast to his head.

Thirteen years later, a psychiatrist linked the suicide to Post-traumatic Stress Disorder—PTSD—brought on by Ragland's Vietnam experiences.

The Veterans Administration had repeatedly rejected Rose Ragland's claim that her husband's death was caused by the war.

But this spring, with pressure from the Virginia Division of War Veteran's Claims and Vietnam Veterans of America, the VA conceded that Ragland had died a soldier's death. For the first time, the agency awarded benefits to the widow of an ex-soldier who had committed suicide as a result of the disorder.

• • •

He was born Michael Martinek to Czech parents in Copenhagen, Denmark, on the Fourth of July, 1947.

Both his grandfathers—one a Czech military officer, the other a government official—were executed by the Nazis in World War II.

Political tumult continued in Czechoslovakia after the war, and the Martineks fled the communist regime for New York when Michael was about two.

His parents divorced when Mike was about six. A few years later, his mother married a Richmond physician, Dr. Stuart Ragland Jr.

After moves to Richmond and Pensacola, Florida, the Raglands settled in Pipersville, Pennsylvania.

In 1966, Ragland matriculated at VMI, which his stepfather had attended for three years before medical school.

Mike Ragland loved the spit-and-polish atmosphere and the stiff discipline of academy life. He was named a distinguished military student and was supply sergeant on the regimental staff. A blurb in the school yearbook calls him "an example of military perfection."

When his mother and stepfather divorced during his first year at VMI, Mike's concentration slipped and his studies took a slide. But he switched majors—biology to English—before the start of his second year and quickly regained his balance.

"Mike's cadetship has been characterized by three main factors: excellence in the military aspects of cadet life, a striving for academic competence, and Rose."

—The 1969 Bomb (VMI yearbook)

In the summer of 1967, Rose Marie Higgins, a 20 year old from Waverly, had just finished her sophomore year at Randolph-Macon Woman's College. She had stayed at the Lynchburg campus over vacation to teach biology under a National Science Foundation program.

She'd had fun dating a few VMI cadets since coming to school, so when the cadet nephew of one of her professors asked her to double with one of his brother rats, she accepted.

"They were an hour and a half late," Rose recalled. "I just sat in the lobby playing the piano. I was mad as a hornet."

The cadets finally arrived and Rose cooled down. She liked Mike Ragland, her blind date, and the foursome had a good time.

Three days later, she got the first of many letters from Mike. That fall, they started dating regularly.

"We did all the regular VMI things: Pine Room parties or Zollman parties [with] live bands, lots of bourbon or gin, kegs of beer. We had some wild times." She punctuated the recollection with a short burst of bright laughter.

By Christmas of their senior year, Mike and Rose were engaged. They would marry in the summer after graduation.

"An unofficial sweetheart of C Company, Miss Higgins has been a standard feature at VMI, bearing up well to the idiosyncrasies of dating a cadet. We are certain that success and happiness will accompany Mike and Rose wherever they may go."

—The 1969 Bomb

About 200 people gathered at the Waverly Methodist Church on Aug. 2, 1969, as Mike and Rose exchanged wedding vows. They took a four-day honeymoon in Canada. Knowing he would be starting his army hitch at Fort Benning, Georgia, in the fall, Rose and Mike took temporary jobs at a hospital in Richmond, he as an orderly, she as a lab technician.

In November, they were in the army

• • •

At Fort Benning, and later at Fort Hood, Texas, the Raglands found VMI friends to party with. She found army life not bad; he found it great.

"Mike was a military person. He loved it. He ate it up. The harder it was the better he liked it."

Basic training, officer training, airborne training, Ranger school—it all pointed him toward his immediate goal: Vietnam.

"He wanted to go. We had a big fight about it," Rose said. "I didn't want him to volunteer. If they sent him, that was one thing, but I didn't want him to volunteer.

"I was not opposed to the war, but I'm not sure I understood what the hell was going on at the time."

He left for Vietnam in November 1970, "and I was determined to survive," Rose said. "We had had a wonderful year and a half together and I was eager to get on with the next 40 or so."

There were tears of fear and sadness at the airport, but soon there were cheerful letters from the war. There was rarely a day that he didn't write at least a paragraph.

In the spring of 1971, Rose and Mike met for R&R—rest and recreation— "a wonderful second honeymoon" in Hawaii.

"He was fine when I met him in Hawaii, at least what you could tell in 10 days," she said. "He couldn't wait to get home, start a family . . .

"Mike's letters kept coming and everything seemed OK. I'll never know how much he really told me, but his letters made it sound almost safe."

4 July 1971

Dearest Rose,

Happy Birthday to me! Well, here we are in fun Vietnam with the sun setting, the dinks going back to their bunkers and waiting for tomorrow's resupply—all sorts of good things then. . .

What I wrote about the [illegible] was just the beginning of our bad luck. Of the 21 people I came out with, [illegible]. Not bad huh? It seems we've found something we're not supposed to, [illegible] telling what just yet . . . so far I'm still walking around in one piece.

I received the care package with the pudding and the Kool-Aid. But please, next time send pre-sweetened . . .

Rose didn't realize until much later that Mike was sweetening the war for her consumption. One particular note, though, left a bitter taste—the one that told about Tom Blair.

Blair was Mike Ragland's closest friend. They were brother rats—members of the same cadet class—and roommates at VMI. They were fellow officers in the same infantry battalion in the war.

In May 1971, Mike and Tom got a chance to go out drinking and catch up on old times before returning to their units. A few days later, Blair was hit in the chest.

"Mike went to see him and thought he was going to be fine," Rose said.

Blair died the next day.

"The thing that struck me was [Mike's] reaction: 'Oh, well, Tom's dead.' Very cool and very glib. It shocked me. His response to the whole thing bugged me. But I never talked to him about it. I let it slide."

As his hitch neared the end, Mike started to look beyond the war.

12 July 1971

Dearest Rose Marie,

It won't be too much longer until I'm home and I only wish I knew what I was

Naked Before the World: Rose Ragland Wins Her Unknown War

Officially, the Vietnam War claimed the lives of 58,132 men and women. Unofficially, it is a popularly held belief that since the war's end more veterans have died by their own hand than during the war. In 1972, former first lieutenant Michael J. Ragland became one of these unofficial post-war deaths.

The accompanying article, about the life and death of Mike Ragland, is a poignant story of one veteran's suicide. It is also an inspirational account of Rose Ragland's courageous struggle to have the Veterans Administration (VA) acknowledge that her husband's death was the direct result of his Vietnam service.

Having been involved in the prosecution of Rose's claim, it's difficult to write objectively about her case. To me, it's as if Mike and Rose Ragland are old friends; yet, I knew neither of them.

On his return from Vietnam, at age 24, Mike Ragland had already established a record of accomplishment few Vietnam veterans could claim. By all accepted standards, Mike was the personification of a *soldier's soldier*. He was a graduate of one of the country's most prestigious military institutions. He had been an Airborne Ranger qualified combat infantry officer, who had been valor decorated for his service with the 101st Airborne Division in Vietnam.

To any reasonable individual, Mike Ragland's future would have appeared predictably bright and full of promise. Yet, just after his 25th birthday, seemingly without reason or explanation, he did the unpredictable. Mike Ragland placed the muzzle of a shotgun to his head—and fired the last shot of his Vietnam war.

In the 14 years since Michael Ragland's death, Rose Ragland has lived with self-imposed guilt, a feeling that she might have, in some way, been responsible for her husband's death. Obviously, to Rose it is significant to understand that Mike's death was the result of Post-traumatic Stress Disorder (PTSD). For others, it is important to realize that for the first time the VA has "recognized" previously undiagnosed PTSD as the cause of a veteran's suicide, prior to 1980.

The 1980 publication of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders (3rd Edition)* (DSM III), established PTSD as a recognized, treatable, and VA-compensable disability.

Much has been done in recent years to help veterans and their families cope with the lingering readjustment problems caused by PTSD. Sadly, there has been virtually no help for the *surviving spouses and children of veterans*, like Mike Ragland, who took their own lives prior to 1980.

Vet centers, VVA chapters, and other community-based organizations have established a counseling and service network for those who continue to have problems related to the Vietnam experience. Without a doubt, PTSD disability recognition and compensation, coupled with aggressive outreach and counseling, has prevented an undetermined number of additional post-war suicides.

Since 1980, although difficult, it *has* been possible to establish PTSD as a VA-compensable disability for veterans. In some cases it has also been possible to secure VA Dependency and Indemnity Compensation (DIC), and educational assistance for the surviving spouses and children of veterans who died as a result of their PTSD, if diagnosed during the veteran's lifetime.

Ironically, the 1980 publication of DSM III, while giving recognition to PTSD, also created—at least at the VA—a "diagnostic gap." Unfortunately, the veterans who took their own lives between their Vietnam experiences and 1980, fell into this gap. Without absolute proof that their deaths were directly related to their military service, the VA would not allow benefits, based on service-connected death, for their survivors.

In recent years, we have come to recognize many of the unofficial war deaths, like Mike Ragland's, as the ultimate manifestation of acute service-related PTSD. Veterans and their families, if not the VA, long ago understood that PTSD did not just magically appear with the publication of DSM III in 1980.

The successful resolution of Rose Ragland's claim for DIC has established a precedent. In Rose's case, the VA has accepted a posthumous diagnosis that Mike Ragland suffered from service-related PTSD at the time of his death. It is the first such case granted by the VA for a surviving spouse of a veteran who had committed suicide prior to the 1980 publication DSM III, and whose PTSD had not been diagnosed during the veteran's lifetime.

The precedent established in Michael Ragland's case gives renewed hope that compensation, compassion, and recognition, will at last be possible for the surviving spouses and children of early post-war casualties. Some thanks are in order to those who helped with this case.

First, a very special thanks to Rose Ragland who, in fighting the VA, "stood naked before the world," to right an obvious wrong. Her unselfish resolve will not only be a help, but will serve as an inspiration to others in a similar situation.

Thanks to Harvey Barker and Joe Rickman, VVA service representatives with the Virginia division of War Veterans' Claims. Harvey "found" Rose's case and brought it to my attention, while Joe did all of the "grunt work" in gathering documentation for Rose's claim. Thanks to Mike Ettinger of VVA Legal Services who followed the case at VA Central Office in Washington. Thanks also to Tim Orwig, a veteran of the Vietnam War and staff writer for the *Roanoke Times & World-News* who worked so hard to tell the story of Mike and Rose Ragland.

And finally, a special thanks to the VA employee who shared our resolve in winning this case and helped develop the arguments that finally prevailed. For obvious reasons, this person must remain anonymous. ■

—By Rick O'Dell
VVA National Treasurer

going to do definitely . . .

12 August 1971

Dearest Rose Marie,

Well love girl, only ten more nights out here and I'll be safe and sound this time around. And then I'll be on my way home forever and ever and believe me when I say I can't wait for that day. I've done my thing—I've been shot at and I've shot at them and now I'm ready to settle down, sleep in my own bed every night and wear clean clothes and live like a human. And I'll be able to be with my pretty wife all the time to take care of me and to take care of . . .

"Finally it was September and he was on his way home," Rose wrote in a letter to a friend. "I remember meeting him at the airport and crying like a baby. I was so relieved that he was home and SAFE."

• • •

The happy homecoming was brief. "After a short couple of weeks of bliss, things started to fall apart," Rose recalled.

"He wanted to go to medical school. That was his goal in life. He would have made an excellent doctor."

But to enroll, Mike needed to pick up a few science courses and boost his VMI grade-point average. He applied for veterans' education aid, but the VA turned him down because he was not enrolled in a degree program.

"He went looking for a real job and couldn't find one. He was looking for a managerial, office or sales-type position. He had about 10 or 15 interviews and got nowhere," she said. "That's when he started getting negative attitudes. 'I'm no good.'"

She tried to persuade him to stay in the army and go to medical school, but he refused. He assumed that he had been an utter failure in the military, that he did not deserve any of his medals.

"I didn't even know about his Purple Heart until he got home. He'd been hit by shrapnel during a fire fight, but he said he didn't deserve [the medal]. He was disgusted that he'd gotten it."

Ragland had come back with a fungus that covered his legs. He tried to get medical help from the VA, but gave up after six weeks of waiting to see if he could get approval for treatment. He went to a private doctor. Approval from the VA finally came—12 weeks after he'd applied.

Mike enrolled in science courses at the University of Richmond, paying his own way. He returned to his old hospital job as a nurse's aid evenings and weekends.

"I was working full time, my family has money, he didn't need to work," Rose said. "I wanted him to go to school full time but he wouldn't hear of that."

Why? "Male ego, underlined six times. He'd say, 'I should be able to support my wife.'"

So they both worked and he went to school and studied every night.

The marriage fell apart.

"I never had a husband in bed. I fed him dinner and that was it. We started to fight about the stupidest stuff. It got to the point there was no real communication. I couldn't get him to relax, unwind. It was like we weren't married.

"It was [illegible]. There was no anger. He was just sad. He just gave up. No anger."

He began to doubt his ability and worth, she said. He assumed he had never accomplished anything worthwhile.

"He felt he had failed at everything, and there was nothing that I could do or say that helped," Rose wrote to a friend. "I knew things weren't going well, but I believed in the power of love and perseverance! I knew that in time everything would work out. The problem was that I believed in Mike when he didn't believe in himself."

Mike never talked to his wife about the war. She never heard him swap war stories with his buddies.

"He never talked about Vietnam. Not specifics. I never asked about it. It was over and done."

But she sensed that her husband was bitter about the cold reception the country gave its returning veterans.

"The whole attitude in general surprised and hurt him. Not so much that they didn't say thanks, but that the reaction was so negative."

On their third wedding anniversary, "I screwed up royally," she said. Mike gave her the 3-speed bicycle she'd been wanting. She was thrilled, but "being the romantic I am, I also expected a candlelight dinner out somewhere."

There was no dinner. Several days later, she mentioned her disappointment and "he flew off the handle. It made me feel like a heel."

They argued, she cried.

"I blamed myself for wanting too much. I'll never forget when Mike said, 'We aren't going to make it are we?' I was stunned that he could think that."

A week later, he was dead.

• • •

On Friday morning, Aug. 11, 1971, Rose Ragland found a note from Mike on the television.

"It just said, 'Hi, I'm going to Waverly to go hunting. I love you, bye. Don't bother calling me at lunch time.'"

Mike sometimes went hunting in the big woods near the Higgins family home.

"It was nothing unusual, but the whole day it bugged me," Rose said. "When I got home, the shotgun was gone from the closet. I was bothered. I waited around for two hours."

Her father reckoned Mike had gone back in the big woods. He went to look for him.

"I knew," Rose said. "My father called around 11 o'clock. He said, 'It's bad.' He couldn't tell me. I said, 'Just say it.' I already knew."

He had found Mike's body in his car in the big woods. There was a note on the dashboard.

Dearest Rose,

Please forgive me. I love you more than you'll ever realize and more than I've ever shown. But I just can't keep on going. I wanted to give you so much and now those dreams of ours are beyond reach. Don't blame yourself for anything. Tell everyone goodbye and give them my love.

I love you,

Michael

"We all blamed ourselves," said Rose. "I blamed the fight over the anniversary. I wondered what I could have done differently."

She contacted the VA and learned that a grateful nation would provide a flag-draped casket for Michael Ragland's burial. "That was it."

He was buried in the Higgins family plot in Waverly, next to Rose's mother.

• • •

Michael Ragland in Vietnam

was an organic chemistry final. He thought he had failed it. He thought he had failed everything.

Three weeks later, Rose got his grade in the mail: B plus.

"He'd lost all sense of reality. I spent two years wondering why someone could do that to himself, how someone could be so miserable. I gave up. I'll never understand it.

"I remember wishing he had been killed over there," she said. "I was prepared for that. When they come home you think they're safe, then whammo! You're not ready."

She spent years grappling with her loss. "I was married for three years and I saw my husband for six months. I had lost my marriage to Vietnam. I felt I was owed something. Maybe I was selfish."

But the country owed her nothing, according to the VA.

Twelve years passed. Rose saw a public service announcement on television about depression, delayed stress and suicide. The ad said to contact the VA.

"I thought, 'Damn, why didn't they have this 12 years ago?' "

She called the state Division of War Veterans' Claims office in Richmond and told claims agent Joe Rickman, "My husband came home and killed himself."

Rickman's reaction: "What took you so long?"

Rickman was interested in the case. "[Ragland] went through a pretty rough time in 'Nam. When he got home, the good VA and various people treated him like he was a bag of manure or worse."

Rickman asked Rose to pull together all the documents she could—marriage certificate, Mike's letters from Vietnam—and prepare a written statement describing Mike before and after his overseas tour.

"I reread every letter and sat on that sofa and bawled for a whole night," Rose said. "I was depressed for a week."

Rickman didn't hear from her for several weeks. Finally, in May 1984, she sent the pile of material he'd asked for.

"This is one of the hardest things I've ever done because it's like standing naked before the world," Rose wrote to Rickman.

"I find myself in the funny position of feeling as guilty about this claim as the guys who went there have been made to feel. I'm sorry I took so long."

The VA regional office in Roanoke lost the Ragland file when it arrived, Rickman said. The office didn't get around to denying the claim until March 1985.

A terse computer-written letter told Rose, "the evidence does not establish that the veteran's death was due to disease or injury incurred in or aggravated by military service."

On the recommendation of Rickman and Rick O'Dell, administrative services manager of the state Division of War Veterans' Claims office in Roanoke, Rose took her case to Dr. Joel J. Silverman, interim chairman of the department of psychiatry at the Medical College of Virginia.

Silverman received a foot-high stack of Mike's letters and interviewed Rose for more than an hour.

Rose said the psychiatrist seemed skeptical at first, but changed his mind after their interview.

In April 1985, Silverman wrote to Rickman with an unusual posthumous diagnosis: At the time of his death, Ragland suffered from an acute case of Post-traumatic Stress Disorder.

"Based on this history, no other diagnosis is likely," Silverman wrote. "Additionally, there was no reasonable or adequate motive for the patient's suicide other than PTSD."

Rickman promptly forwarded Silverman's letter back to the VA and asked the regional office to reconsider its earlier decision.

The response was swift and negative.

I was married for three years and I saw my husband for six months. I had lost my marriage to Vietnam. I felt I was owed something. Maybe I was selfish . . . It has taken me 15 years, but finally I know why he died. Now I have an answer. It was worth it for that.

The new evidence was based on the conclusions of a doctor who had never seen the veteran during his lifetime, the VA said in its denial.

Rickman was prepared to appeal the case, but O'Dell had a different idea.

O'Dell, a national officer of the Vietnam Veterans of America, referred the case to VVA Legal Services.

Rose Ragland agreed to let that group seek an administrative review of the regional office's decision by the national VA office. O'Dell argued that the case involved "issues of legal interpretation that cannot be resolved at the regional office level."

If the review were unsuccessful, O'Dell said, Rose would still have the option of taking her claim to the regional board of appeals.

Although no judicial review of veterans' cases is allowed under current law, O'Dell fired off what amounted to a four-page legal brief spelling out the facts of the case and citing pertinent law.

O'Dell's plea concluded: "It has been 13 years since the veteran died, yet his wife still remains uncompensated for his tragic death which had its roots in the Vietnam War. The continued denial of this claim is contrary to the moral and legal obligations of this country in caring for its veterans and their survivors."

This past April, Gerald P. Moore, director of VA's compensation and pension service office in Washington, responded:

"There is no way to either verify refute the diagnosis of PTSD by a priv psychiatrist in 1985 based on a review veteran's correspondence to his wife a her assessment of his behavior followi his return from Vietnam."

But, citing Ragland's war recor Moore conceded: "Combat is one of t stressors which can result in PTS Resolving all reasonable doubt in widow favor, based on a difference of opinio service connection for cause of death is be granted."

Rose Ragland had won. "Rickma won. He did it all," she said.

Not to mention O'Dell and VVA.

The Ragland case was one of a kin Rickman said, as far as getting the VA recognize a war link with a veteran suicide.

"I know of a number of vets from 'Na that have committed suicide," Rickma said. "I think there are one heckuva lot guys running around today with th potential and some who have already undoubtedly committed suicide because (PTSD)."

Rose Ragland was awarded about $60 a month, retroactive to May 1984, whe she first filed for compensation. But she didn't do it for the money.

"The monetary part is the small side o it for me," she said. But it may not be fo other widows.

It has taken me 15 years, but finally know why he died. Now I have an answer It was worth it for that."

Knowing that she is not to blame for her husband's death "doesn't make it any easier to live with," she wrote to Rickman. "I don't think I can ever forgive this country for what it did to so many."

She elaborated on her feelings in a recent interview at her home near Powhatan

"What they did to those guys, to my friends, they destroyed that generation. To criticize all those guys for doing what they had to do, whether they agreed with it or not . . ." she shook her head angrily.

Money doesn't buy her forgiveness.

"No monument in Washington is going to make up for what they did to those kids," she said. "It's too late. It's 15 years too late."■

This article was reprinted from Roanoke Times & World-News, of Roanoke, Virginia.

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EXPLANATORY STATEMENT ON THE COMPROMISE AGREEMENT ON S. 11 AS AMENDED, THE "VETERANS' JUDICIAL REVIEW ACT"

This document explains the provisions of S. 11, the proposed "Veterans' Administration Adjudication Procedure and Judicial Review Act", as passed by the Senate on July 11, 1988; H.R. 5288, the proposed "Veterans' Judicial Review Act", as passed by the House of Representatives on October 3, 1988, as a substitute amendment for the text of S. 11 (hereinafter referred to as the "House amendment"); and the provisions of a compromise agreement between the Senate and House Committees on Veterans' Affairs on those provisions, which will be offered as a proposed Senate amendment to the House amendment to S. 11 as so amended and passed by the Senate. The differences between these various measures and the provisions of the compromise agreement are noted below, except for clerical corrections, conforming changes made necessary by the compromise agreement, and minor drafting, technical, and clarifying changes.

TITLE I -- ADJUDICATIVE AND RULEMAKING AUTHORITY OF THE VETERANS' ADMINISTRATION

DECISIONS BY ADMINISTRATOR

Senate bill: The Senate bill (section 301) would amend section 211(a) of title 38, relating to decisions of the Administrator, to expand the present categories of exceptions to the general preclusion of judicial review of such decisions by referencing new subchapter II of chapter 71, the new judicial review subchapter added by title III of the Senate bill.

House amendment: The House amendment (section 2) would amend section 211 to --

(a)(1) specify that the Administrator must resolve all questions of law and fact -- not only those arising under laws administered by the VA as under present section 211(a) -- that are necessary to a decision under a law affecting the provision of benefits to veterans and the dependents and survivors of veterans, and (2) to expand the general preclusion of judicial review to the same extent;

(b) expand the present categories of exceptions to the general preclusion by making reference to section 223 of title 38 (as proposed to be added by section 3 of the House bill, discussed below), regarding rulemaking, and to matters covered by new chapter 71, the new judicial review subchapter added by title III of the bill;

(c) specify that the Attorney General, upon request, is to provide the Administrator with advice regarding any question of law arising under either the Constitution or any law other than a law providing benefits for veterans and the survivors and dependents of veterans.

Compromise agreement: The compromise agreement (section 101) contains the House provision with amendments (a) to clarify that the requirement to make decisions and the general preclusion of judicial review apply only to a decision by the Administrator under a law that affects the provision of benefits by the Administrator; and (b) to delete the amendment relating to the Attorney General's opinions.

VETERANS' ADMINISTRATION RULEMAKING

Senate bill: The Senate bill (section 201) would amend subchapter II of chapter 3 of title 38 to add a new section 223, relating to agency rulemaking, which would --

(a) define "regulation" to include (1) statements of general policy, instructions, and guidance, and (2) interpretations of general applicability issued or adopted by the Administrator;

(b) define "rule" as having the meaning set forth in section 551(4) of title 5;

(c) require application of the rulemaking provisions of the Administrative Procedure Act (APA) (5 U.S.C. 553) to all VA rulemaking matters other than those involving agency management, personnel, public property or contracts; and

(d) provide that rules and regulations issued or adopted by the Administrator shall be subject to judicial review.

House amendment: The House amendment (section 3) would add a new section 223, relating to agency rulemaking, which would --

(a) require that, in the application to the VA of section 552(a)(1) of title 5, requiring the publication of certain information in the Federal Register, the Administrator must take care to ensure that subparagraphs (C) and (D) of that section, relating to rules of procedure, forms, and substantive rules of general applicability, are complied with, particularly with respect to opinions and interpretations of the General Counsel;

(b) require application of the rulemaking provisions of the APA to any matter relating to loans, grants, or benefits under the jurisdiction of the Administrator;

(c) provide that an action of the Administrator to which either section 552(a)(1) or 553 of title 5 (or both) applies, other than an action relating to the adoption or revision of the schedule of ratings for disabilities under section 355 of title 38, shall be subject to judicial review, generally in accordance with chapter 7 of title 5 and only in the U.S. Court of Appeals for the Federal Circuit (hereinafter referred to as the "CAFC"); and

(d) require that, if judicial review of such an action is sought in connection with an appeal under the provisions of chapter 71 of title 38, as amended by the House amendment, the provisions of chapter 71 would apply rather than chapter 7 of title 5.

Compromise agreement: The compromise agreement (section 102) contains the House provision with an amendment requiring compliance with subparagraph (E) of section 552(a)(1) of title 5, relating to amendments to the material covered in subparagraphs (C) and (D). Additionally, it contains a freestanding provision requiring the Administrator to submit to the Committees, not later than May 1, 1989, a report as to how the Administrator will comply with (a), above.

The Committees note that under this provision the CAFC would be authorized to review agency records which underlie challenges to rules and regulations.

VETERANS' ADMINISTRATION ADJUDICATION PROCEDURES

Requirements Relating to Proof of Claims

Senate bill and the House amendment: The Senate bill (section 101) and the House amendment (section 6) would amend chapter 51 of title 38 to add a section which would codify the burden of proof and reasonable doubt standards in VA claims adjudication proceedings currently provided for by regulation (38 CFR 3.102 and 3.103). The House amendment would also require the Administrator, in assisting a claimant develop his or her case, to request information described in section 3006 of title 38, relating to furnishing of information by other agencies.

Senate bill: The Senate bill (section 105) would, as discussed more fully below under the heading "Reopening of Disallowed Claims", require the Board to reopen a claim when new and material evidence is presented and allow reopening upon the showing of good cause.

House amendment: The House amendment (section 6) would further allow the Administrator, upon the presentation of new and material evidence, to review any previous determination of the Administrator with respect to benefits under laws administered by the VA.

Compromise agreement: The compromise agreement (section 103) contains these provisions with an amendment deleting the discretionary reopening provision in the Senate bill.

Service of Subpenas

Senate bill: The Senate bill (section 102) would specify procedures for the service of subpenas authorized under section 3311 of title 38, including procedures for personal service or service by mail.

House amendment: No provision.

Compromise agreement: No provision.

Attorneys' Fees

Senate bill: The Senate bill (section 401) would amend section 3404 of title 38, which sets a limitation of $10 on the amount a claimant may pay an attorney in connection with a VA claim. The bill would authorize reasonable attorneys' fees, within certain limits, for representation of individuals before the VA after the Board of Veterans' Appeals first renders a final decision. Fees would also be authorized for representation in a case appealed to court under the judicial review provisions proposed to be added by title III of the Senate bill, with a specified limitation in cases in which the matter is resolved in a manner unfavorable to the claimant. Specifically, the Senate bill would --

(a) eliminate the $10 limitation on the amount an attorney may receive for services rendered after the first final BVA decision;

(b) permit the Administrator, and the Chairman of the BVA as to representation in connection with matters before the Board, to approve a reasonable attorney's fee for representation within the VA after a BVA decision, up to a maximum of either $500 or, if the claimant and attorney have entered into a contingency-fee agreement, not more than 25 percent of any past-due benefits awarded the claimant. This amount could be approved where, for example, a case remains before the VA for reconsideration or for reopening on the basis of "new and material evidence";

(c) authorize the Administrator and the Chairman to increase the $500 maximum limitation in future years to reflect changed economic conditions;

(d) authorize the Chairman to approve a fee higher than the $500 limitation in an individual case involving extraordinary circumstances warranting a higher fee;

(e) allow a reviewing court to approve a reasonable attorney's fee and specify that (1) for cases not resolved in a manner favorable to a claimant, the court must ensure that the claimant pay no more than $750, and (2) for cases resolved in a manner favorable to a claimant, the court may approve a reasonable fee, or, if a claimant and an attorney had entered into a contingent-fee agreement, a fee not exceeding 25 percent of the total amount of past-due benefits;

(f) authorize the VA to make payment to an attorney from past-due benefits, but preclude payments from benefits payable for a period following the date of the decision entitling the veteran to benefits;

(g) limit the applicability of the attorneys' fees provisions to cases involving claims for benefits;

(h) for the purpose of attorneys' fees provisions, define a claim as being "resolved in a manner favorable to the claimant" when any or all of the relief sought is granted;

(i) authorize a court to award to a prevailing party, other than the Administrator, reasonable attorneys' fees and costs in accordance with the provisions of the Equal Access to Justice Act (section 2412(d) of title 28) under which such an award may be made unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust; and

(j) amend section 3405 of title 38 to provide criminal penalties for willfully and intentionally defrauding a VA claimant.

House amendment: The House amendment (sections 4 and 5) would amend section 3404 to --

(a) revise the present limitation in order to --

(1) prohibit an attorney or agent from receiving any fee for services rendered prior to the rendering of a statement of the case by a Regional Office under section 4005(d)(1);

(2) authorize reasonable attorneys' fees for representation of individuals before the VA after a statement of the case is issued;

(3) require the filing of a copy of any fee agreement between the agent or attorney and the claimant with the VA, with respect to proceedings before the VA, at such time as may be specified by the Administrator;

(4) authorize the Administrator to review such a fee arrangement and order a reduction in the fee if the Administrator finds the fee to be excessive or unreasonable, with such an order under this section reviewable in the Court of Veterans Appeals;

(5) authorize payment of a reasonable fee for services with respect to representation before the Court of Veterans Appeals (as provided for in section 5 of the House amendment); and to require the filing with the Court of Veterans Appeals of a copy of any fee agreement between the agent or attorney and the claimant;

(6) authorize the Court to review such a fee arrangement and to order a reduction in the fee if it finds the fee is excessive or unreasonable; and

(7) provide that such an order would not be reviewable in any other court; and

(b) amend section 3405 to modify the penalties for violation of the restrictions in section 3404, relating generally to VA claims, or section 784, relating to suits on VA-administered insurance claims, to specify that a violation of those provisions is a misdemeanor.

Compromise agreement: The compromise agreement (section 104) contains the House provisions with amendments that authorize the Board to review fee agreements for reasonableness in those instances where a charge for representation before the VA or the Board is authorized. It also provides that (a) no fee may be charged until after the BVA first renders a final decision; (b) a reasonable fee may be charged for representation before the VA only if the attorney is retained within one year from the date of the first final BVA decision; (c) the claimant and the attorney, pursuant to a contingency agreement, may agree to have the Administrator pay the attorney's fee out of past-due benefits, but the fee under such an agreement cannot exceed 20 percent of the past-due benefits awarded; (d) the Board, not the Administrator, would decide whether a fee is reasonable; and (e) decisions by the Board as to the reasonableness of fees would be reviewable in the U.S. Court of Veterans Appeals, but not by any other court. In addition, the compromise agreement adopts the Senate provision in (h), above, relating to the definition of a favorable resolution.

TITLE II--BOARD OF VETERANS APPEALS

INDEPENDENCE OF THE CHAIRMAN

Senate bill: The Senate bill (section 103) would amend present section 4001(a) of title 38, relating to the composition of the BVA, to delete the provision making the Chairman of the Board directly responsible to the Administrator.

House amendment: No comparable provision. The House amendment would abolish the BVA, replacing it with a 65-member Court of Veterans' Appeals as described under title III, below.

Compromise agreement: No provision.

TIMELINESS OF DISPOSITIONS

Senate bill: The Senate bill (section 103) would further amend section 4001(a) to specify that the Board is to employ sufficient numbers of support personnel to enable it to dispose of appeals before it in a timely manner.

House amendment: No comparable provision. The House amendment (section 5) contains a provision requiring the Court of Veterans' Appeals established by section 5 of the House amendment to dispose of cases "as quickly as practicable."

Compromise agreement: The compromise agreement (section 202(b)) contains the Senate provisions made applicable to BVA members as well as support personnel.

APPOINTMENT AND REMOVAL OF THE CHAIRMAN AND MEMBERS

Senate bill: The Senate bill (section 103 of the Senate bill and section 503 of S. 2011, the proposed "Veterans' Benefits and Programs Improvement Act of 1988" as passed by the Senate on October __, 1988, as a substitute amendment for the text of H.R. 4741) would amend present section 4001(b), relating to the appointment of members of the Board, to --

(a) require the President, by and with the advice and consent of the Senate, to appoint the Chairman for a term of five years; provide that an individual may serve as Chairman for no more than three complete terms; and (only in S. 2011) provide that the Chairman may be removed by the President after notice and hearing, for inefficiency, neglect of duty, or malfeasance in office;

(b) require the Chairman (after one is appointed with advice and consent) to appoint Board members for a term of nine years; provide that a member appointed to fill a vacancy, whether caused by resignation, death, or removal, would serve for the remaining unexpired term; and allow Board members to be removed by the Chairman for good cause, subject to the due process protections in title 5 relating to adverse personnel actions against Administrative Law Judges;

(c) require the President to appoint the Chairman not later than one year after the date of enactment and allow the serving Chairman to continue until a successor is appointed;

(d) allow the individual serving as Chairman on the date of enactment to continue serving until a successor is appointed and provide that, if that individual is appointed, none of the time served prior to the appointment would count in calculating the terms he or she may serve; and

(e) provide that, of the first Board members appointed, 21 would be appointed for a three-year term, 22 for a six-year term, and [illegible] for a nine-year term; and that an individual who is serving as a member of the Board may continue to serve until the earlier of the date on which the individual's successor is appointed or the expiration of the 180-day period after the Chairman is appointed.

House amendment: No provision.

Compromise agreement: The compromise agreement (section 201) contains the Senate provision with amendments to provide that (a) the term of the Chairman would be six years, with no limit on successive terms; (b) removal of the Chairman would be by the President, after notice and an opportunity for hearing, on grounds of misconduct, inefficiency, neglect of duty, engaging in the practice of law, or physical or mental disabilities which in the President's opinion prevent proper execution of the duties of the office; (c) 65 Board members (in addition to the Vice-Chairman) would be appointed by the Administrator, upon the recommendation of the Chairman, with the approval of the President; and (d) the effective date (section 401) for the nomination of the Chairman would be February 1, 1989.

The Committees note that the Administrator, with the approval of the President, is expected to designate the incumbent member to be replaced (if an incumbent is not reappointed) at the time of the appointment of each member to his or her term. The Committees intend the nomination for Chairman to be submitted before any of the new Presidential appointments (other than the Secretary, Deputy Secretary, and Inspector General) authorized in H.R. 3471, the Department of Veterans Affairs Act.

SALARY OF THE CHAIRMAN

Senate bill: The Senate bill (section 103) would require the Chairman to be paid at Executive Level IV.

House amendment: No provision

Compromise agreement: The compromise agreement (section 201) contains this provision.

ANNUAL REPORT ON BOARD ACTIVITIES AND RESOURCES

Senate bill: The Senate bill (section 103) would require the BVA Chairman to report to the Committees on Veterans' Affairs annually on the Board's current and future workload and its ability, based on then current and projected staffing, to dispose of appeals in a timely manner.

House amendment: No provision.

Compromise agreement: The compromise agreement (section 208) contains this provision with an amendment to require submission of the report as part of the agency's budget justification documents.

AWARDING PERFORMANCE INCENTIVES

TO BOARD MEMBERS

Senate bill: The Senate bill (section 103(c)) would preclude the payment of any direct or indirect bonuses (in addition to salary) relating to service on the Board for Board members and temporary members.

House amendment: No provision

Compromise agreement: The compromise agreement (section 209) would further amend section 4001 of title 38 by providing that a performance incentive authorized by law may be awarded upon a determination by the Chairman that a member should be awarded that incentive. In making that determination, the Chairman would be required to take into consideration the quality of performance of the Board member.

DETERMINATIONS BY THE BOARD

Senate bill: The Senate bill (section 104) would amend section 4003, relating to determinations by the Board, to --

(a) specify that a majority vote is sufficient for an allowance, but a unanimous vote is needed for a denial;

(b) provide that the Board may reach a contrary conclusion upon additional information after notice to the claimant and an opportunity for the claimant to be heard;

(c) preclude a temporary member, appointed pursuant to section 4001(c)(1), or an acting member, appointed pursuant to 4002(a)(2)(A)(ii) of title 38, from casting a vote in any case where the votes of the two regular members are split and require the Chairman to expand the section by at least two members in the event of such a split; and

(d) codify current Board practice (as set forth in 38 CFR 19.181) under which the Chairman may either vote with the majority or expand the section when there is a disagreement among the members of a section in any case in which unanimity is required for a final determination.

House amendment: No provision

Compromise agreement: The compromise agreement (section 202(a)) would (a) provide for decisions, for either an allowance or a denial, to be by a majority vote; (b) provide that such a decision is final unless the Board orders a reconsideration; and (c) require that, if the Board orders a reconsideration, the Chairman must expand the panel.

The Committees note that they would prefer that any expansion of a panel upon reconsideration be carried out utilizing only permanent Board members (rather than temporary or acting members). The Committees further note that the language deleted from current section 4003, authorizing the BVA, after it has made a final decision in a case, to "reach a contrary conclusion upon the basis of additional information from the department of the Secretary concerned" does not reflect current agency practice in that such action generally occurs at the Regional Office level and need not be premised only on additional information from the military department concerned but can be from any source. The Committees do not intend any claimant to be disadvantaged by the deletion of this language.

DECISIONS OF THE BOARD

Senate bill: The Senate bill (section 105(1)) would amend section 4004(a), relating to decisions of the Board, to specify that the Board's decision is to be made after giving the claimant an opportunity for a hearing and must be made exclusively on the evidence and material of record in the proceeding and on applicable provisions of law.

House amendment: No provision.

Compromise agreement: The compromise agreement (section 203) contains this provision with an amendment providing that, although the decision must be based on the entire record and upon consideration of the matters specified in the Senate bill, it need not be based exclusively on material in the record, thereby affording opportunity for the Board to take notice (as courts are able to take judicial notice) of matters not on the record.

REOPENING OF DISALLOWED CLAIMS

Senate bill: The Senate bill (section 105(2)) would amend section 4004(b), relating to the Board's reopening of disallowed claims, to --

(a) require the Board (directly or through the agency of original jurisdiction) to reopen a claim when new and material evidence is presented or secured to review the Board's former decision and make a technical correction in the description of the BVA's authority to reopen a claim by deleting (as inconsistent with present practice) the present requirement that new and material evidence sufficient to reopen a claim be in the form of an official report from the proper service department;

(b) allow reopening upon the showing of good cause; and

(c) specify that a court decision upholding denial of a claim under title III of the bill (relating to judicial review) would not diminish the Board's discretionary authority to reopen a claim.

House amendment: As discussed above under the heading "Requirements Relating to Proof of Claims", the House amendment (section 6) would allow the Administrator, upon the presentation of new and material evidence, to review any previous determination of the Administrator with respect to benefits under laws administered by the VA.

Compromise agreement: As noted previously, the compromise agreement (section 103) contains item (a) of the Senate bill and the House amendment.

These provisions were included as amendments to chapter 51, relating to proceedings before the VA generally, to reflect the current practice in which claims are reopened at the Regional Office level, not the Board. The Committees do not intend that any claimant be disadvantaged by the redrafting of this section.

The Committees note that the reopenings would be required without regard to whether a disallowance was by the Administrator or the BVA and whether the disallowance was upheld, in whole or in part, by a court.

NOTICE AND CONTENT OF DECISIONS

Senate bill: The Senate bill (section 105(3)) would amend section 4004(d), relating to the content of Board decisions, to --

(a) require the BVA to mail a detailed statement of its decision to the claimant and the claimant's authorized representative, if any, at the last known address of the claimant and such representative; and

(b) expand the present requirement that BVA decisions be in writing and contain findings of fact and conclusions of law separately stated, to require that such decisions include findings and conclusions and reasons and bases therefor, on all material issues of fact, law, and matters of discretion, as well as an order granting or denying relief.

House amendment: No provision.

Compromise agreement: The compromise agreement (section 205) contains this provision.

PROHIBITION AGAINST PRESUMPTION OF AGREEMENT WITH STATEMENT OF THE CASE FINDINGS

Senate bill: The Senate bill (section 106) would amend section 4005(d)(4), relating to the presumption that an appellant agrees with any statement of fact in the Statement of the Case to which no exception is taken, so as to codify current Board practice under which a claimant is not presumed to agree with any statement of fact or law contained in a Statement of the Case.

House amendment: No provision.

Compromise agreement: The compromise agreement (section 206) contains this provision with an amendment deleting "or law", since there is no current law presumption regarding conclusions of law in the Statement of the Case.

MEDICAL OPINIONS

Senate bill: The Senate bill (section 107) would amend section 4009, relating to independent medical expert (IME) opinions, to --

(a) expressly provide a claimant before the Board with --

(i) the right, upon request, to have the Board acquire an independent medical opinion when there is a substantial disagreement between the substantiated findings or opinions of two physicians on an issue material to the outcome of the case; and

(ii) the right to appeal a denial of a request to the Chairman;

(b) require that notice of any Board decision to deny such a request, the basis for such denial, and the right to appeal a denial to the Chairman be provided to the claimant and the claimant's representative but provide that the decision would not be subject to judicial review; and

(c) require notice to a claimant of any consultation by a Board member with a physician, other than the physician on the Board section deciding the case, along with the results of that consultation and provide 60 days in which the claimant may respond to the opinion. The information gained through this process would be required to be included in the discussion of evidence in the final decision.

House amendment: The House amendment (section 6) revises the current law provisions regarding IME opinions to allow the Administrator to obtain such opinions during Regional Office proceedings.

Compromise agreement: The compromise agreement (section 103) contains the House provision with an amendment, derived from the Senate provision in (c), above, providing as to IME opinions at both the Board and Regional Office levels, that the claimant be notified of a request for an IME opinion and provided a copy as soon as it is received.

The Committees intend that, if the Board or Administrator establishes a mechanism for a claimant to appeal a denial of a claimant's request for an IME opinion, the notice procedures described above in (b) be followed. The Committees also note with approval the current practice of obtaining IME opinions through the Department of Medicine and Surgery.

ADJUDICATION PROCEDURES

Senate bill: The Senate bill (section 108) would add a new section, 4010, to the chapter concerning BVA adjudication procedures entitled "Adjudication procedures", which would --

(a) authorize the Administrator and the BVA to administer oaths and affirmations, examine witnesses, and receive evidence in VA claims adjudication proceedings;

(b) provide for the admission, even if inadmissible under the rules of evidence applicable in court, of all evidence submitted in VA claims adjudication proceedings, subject only to such provisions as the Administrator or Chairman, depending upon the forum, may impose through regulations for the exclusion of irrelevant, immaterial, or unduly repetitious evidence;

(c) provide that, in the course of hearings on a claim for VA benefits following initial denial of the claim, the claimant (or other party) shall have the right to --

(1) review and, on the payment of a fee (waivable by the Chairman of the Board pursuant to regulations that the Administrator must prescribe on the basis of inability to pay or for other good cause shown pursuant to regulations that the Administrator must prescribe) limited to the costs of duplication, to obtain copies of the case files and all materials to be used by the VA at the hearing;

(2) present witnesses and evidence including medical opinions and rebuttal evidence;

(3) make argument and submit written contentions; and

(4) submit to any person written interrogatories which must be answered unless written objections thereto are filed;

(d) provide that --

(1) if the person served with interrogatories files an objection thereto, the Chairman of the Board must, pursuant to regulations that the Chairman must prescribe, evaluate the objection and issue an order directing that answers be given or stating that they need not be given; and

(2) if the person served with interrogatories fails to comply with such an order or, in the absence of an objection, to answer the interrogatories, the party who served the interrogatories would have the right, upon a statement or showing of good cause, to have the Chairman issue a subpena

(enforceable in Federal district court) for the witness' attendance at a deposition at which the unanswered interrogatories would be asked;

(e) provide that, a claimant may request a hearing before a traveling section of the Board with scheduling of such hearings to be on a first-come, first-served basis;

(f) provide that, if a claimant requests a hearing before a traveling section of the Board but is unable to receive such a hearing due to the limited number of hearings available the Board must afford the claimant an opportunity for a hearing conducted by telephone or closed circuit television before a Board panel or in a videotaped hearing before VA adjudication personnel at the Regional Office;

(g) allow, in the course of any claims proceeding, any VA employee to disqualify himself or herself on the basis of personal bias or other cause and a party to challenge such an employee on such bases;

(h) specify the materials that must be included in the record of VA claims adjudication proceedings and provide that the record shall be available for a claimant's inspection and shall be copied for a claimant upon the payment of a fee (waivable by the Chairman, pursuant to regulations that the Chairman must prescribe, on the basis of the claimant's inability to pay or for other good cause shown) limited to the cost of duplication; and

(i) specify that the adjudication rights contained in title 38 and prescribed thereunder by the Administrator or Chairman are exclusive.

House amendment: No provision.

Compromise agreement: The compromise agreement (section 103) would provide that a claimant may request a hearing before a traveling section of the Board and that the scheduling of such cases will be in the order in which the requests are received by the VA as to each Regional Office.

This section is not intended to require an increase in such hearings, since traveling sections are scheduled as resources permit. In the event that a claimant indicates a desire for a hearing before a traveling section, but cannot be scheduled for the next visit by a traveling section to the nearest Regional Office, the claimant should be advised that he or she will be afforded a hearing as soon as a slot becomes available at that office.

The Committees note that they do not believe it is necessary to codify in law the current Board process as prescribed in the Senate bill. The Committees intend that those informal procedures be continued and that the title 5 procedures relating to adjudications continue to be inapplicable. The Committees encourage the Board to develop alternatives to hearings before traveling Board sections.

NOTICE OF PROCEDURES

Senate bill: The Senate bill (section 108) would require the Administrator and the Chairman, at each stage of claims adjudication proceedings before the VA and the BVA, to provide the claimant with detailed notice, in easily understandable language, of the claimant's procedural rights. The required notice must include:

(a) descriptions of all subsequent procedural stages provided for by statute, regulation, or Veterans' Administration policy;

(b) descriptions of all rights of the claimant expressly provided for in or pursuant to chapter 71 of title 38, of the claimant's rights to a hearing, to reconsideration, to appeal, and to representation; and of any specific procedures necessary to obtain the various forms of review available for consideration of the claim;

(c) in the case of an appeal to the Board, notice of the opportunity for a hearing before a traveling section of the Board; and

(d) such other information as the Administrator or the Chairman of the Board, respectively, as a matter of discretion, determines would be useful and practical to assist the claimant in obtaining full consideration of the claim.

House amendment: No provision.

Compromise agreement: No provision.

The Committees note that they do not believe it is necessary to codify the requirements of notice in the Senate bill because the Committees believe these requirements are a fundamental part of due process rights.

STUDY OF ALTERNATIVE METHODS

Senate bill: The Senate bill (section 109) would authorize the Administrator and the Chairman of the Board to study alternative methods of ensuring the prompt and efficient resolution of claims and affording claimants the opportunity for a timely and convenient hearing or review by a disinterested authority.

House amendment: No provision.

Compromise agreement: No provision.

EFFECTIVE DATE OF AWARDS IN REOPENED CASES

Senate bill: The Senate bill (section 110) would permit retroactive awards for claims reopened and allowed on the basis of new and material evidence in the form of service records.

House amendment: No provision.

Compromise agreement: No provision.

The Committees note that they do not intend that any claimant be disadvantaged by the noninclusion of the Senate provision.

TITLE III -- UNITED STATES COURT OF VETERANS APPEALS

Senate bill: The Senate bill (section 302) would amend chapter 71 of title 38, relating to the BVA, to redesignate the existing provision as subchapter I of chapter 71 and to add a new subchapter II providing for limited judicial review, in the U.S. Courts of Appeals, of (a) final decisions of the BVA denying claims for VA benefits, and (b) VA rules and regulations.

House amendment: The House amendment (section 5) would repeal the existing provisions of chapter 71, thereby eliminating the BVA, and replace them with provisions establishing a Court of Veterans' Appeals (CVA) with not more than 65 members, generally having jurisdiction over all questions involving benefits under laws administered by the VA (but utilizing the Regional Office record of the case in individual claims decisions), with limited appellate review of CVA decisions in the U.S. Court of Appeals for the Federal Circuit (CAFC).

Compromise agreement: The compromise agreement (section 301) would add a new chapter 72 providing for judicial review of BVA decisions on the record, and of VA rules and regulations challenged in the course of a case, by a new Article I court to be known as the United States Court of Veterans Appeals, with limited appellate review in the CAFC. Review of VA rules and regulations on their face, and the process by which they were issued, would be available in the CAFC under the new chapter as well as through direct appeal to the CAFC under new section 223, discussed above under the heading "Veterans' Administration Rulemaking".

SUBCHAPTER I -- ORGANIZATION AND JURISDICTION

Status

Senate bill: No provision. As noted above, judicial review under the Senate bill would be in the U.S. Courts of Appeals.

House amendment: The House amendment (new section 4001 of title 38) would establish an Article I court of record to be known as the United States Court of Veterans Appeals.

Compromise agreement: The compromise agreement (new section 4051 of title 38) contains this provision.

JURISDICTION AND FINALITY OF DECISIONS

Senate bill: No provision.

House amendment: The House amendment (proposed new section 4002 of title 38) would provide for the Court of Veterans Appeals to have exclusive jurisdiction to consider all questions involving benefits under laws administered by the VA, except for review of the schedule of ratings for disabilities under section 355 of title 38 or any action of the Administrator in adopting or revising that schedule. In individual benefits cases, review would be based on the record of proceedings before the VA Regional Office. Decisions of the Court would be subject to appellate review as provided for in the House amendment, except that no other court would be permitted to review a determination by the Court of a factual matter.

Compromise agreement: The compromise agreement (new section 4052 of title 38) contains this provision with an amendment which (a) provides that the Court shall have the power to affirm, modify, or reverse a decision of the Board, or remand the matter, as appropriate; (b) reflects the retention of the BVA; and (c) provides that the Administrator may not appeal to the Court.

The committees note that review in the Court will be on the record created at Regional Offices and at the BVA.

Composition

Senate bill: No provision.

House amendment: The House amendment (proposed new section 4003 of title 38) would --

(a) require the Court to be composed of a chief judge, two deputy chief judges, and not more than 62 associate judges;

(b) require that the judges be members of the bar of a Federal court or of the highest court of a State and be appointed by the President, by and with the advice and consent of the Senate, on the grounds of fitness to perform the duties of the office;

(c) require that the chief judge be the head of the Court;

(d) provide that the term of the chief judge be 15 years and the terms of the associate judges be 10 years;

(e) set the salaries for the chief judge and the two deputy chief judges at the rate for district court judges and the salaries for associate judges at the Executive Schedule Level IV rate; and

(f) provide (1) that the President may remove a judge from office, after notice and an opportunity for a hearing, on grounds of misconduct, neglect of duty, engaging in the practice of law, or physical or mental disability which, in the opinion of the President, prevents the judge from executing his or her duties, and (2) that, once a judge is removed for a reason other than physical disability, he or she would not be permitted to practice before the Court.

Compromise agreement: The compromise agreement (new section 4053 of title 38) contains the House provision with amendments providing that (a) the Court would be composed of a chief judge and not more than 6 nor less than 2 associate judges, with each to serve a term of 15 years; (b) the chief judge would receive the salary paid a judge for the U.S. Court of Appeals; (c) the associate judges would receive the salary paid U.S. District Court judges; and (d) not more than a bare majority (e.g., not more than two out of three or four out of seven) of the judges on the Court may be of the same political party. The provision prohibiting judges removed from office from practicing before the Court, (f)(2) above, is not included.

Organization

Senate bill: No provision.

House amendment: The House amendment (proposed new section 4004 of title 38) would --

(a) provide for the Court to have a judicially noticed seal;

(b) allow judges to hear cases alone or sitting in panels of at least three judges;

(c) require the chief judge to designate the chief of each panel;

(d) provide that a majority of judges would constitute a quorum for the transaction of business of the Court and that a majority of a panel would constitute a quorum for the transaction of the business of a panel; and

(e) provide that a vacancy in the court or a panel would not impair the powers or affect the duties of the Court or a panel or the remaining judges of the Court or of a panel.

Compromise agreement: The compromise agreement (new section 4054 of title 38) contains this provision with amendments to require the Court to establish procedures to assign judges to panels and determine whether a case is to be heard by a single judge or a panel.

Offices

Senate bill: No provision

House amendment: The House amendment (proposed new section 4005 of title 38) would provide that the Court shall have its principal office in the District of Columbia but may sit any place within the United States.

Compromise agreement: The compromise agreement (new section 4055 of title 38) contains this provision with an amendment adding a freestanding provision (section 303) to require that the principal office of the Court be located initially, if practicable, in an existing facility that, in the judgment of the Administrative Office of the United States Courts (AOUSC), would maximize efficiency and economy in the operation of the Court. In making this determination the AOUSC is to take into consideration the convenience of the location to needed library resources, support equipment, personnel and other needed resources.

Times and Places of Sessions

Senate bill: No provision

House amendment: The House amendment (proposed new section 4006 of title 38) would provide that the chief judge shall prescribe the times and places of sessions of the Court, with a view to securing reasonable opportunity to petitioners to appear before the Court with as little inconvenience and expense to petitioners as practicable.

Compromise agreement: The compromise agreement (new section 4056 of title 38) contains this provision with an amendment deleting the reasonable-opportunity clause.

The deleted clause was intended to encourage the Court to hear cases throughout the United States. The Committees do not believe this should be encouraged for a seven-member court, and note that the BVA is authorized to hear cases throughout the country.

SUBCHAPTER II -- PROCEDURE

Scope of Review

Senate bill: The Senate bill (proposed new section 4026 of title 38) would require a reviewing court, to the extent necessary to its decision and when presented --

> (a) to decide all relevant questions of law; to interpret constitutional, statutory, and regulatory provisions; to determine the meaning or applicability of the terms of actions of the Administrator, compel action of the Administrator unlawfully withheld; and to hold unlawful and set aside decisions, findings (other than findings described at item (b), below), conclusions, rules and regulations of the Administrator or the BVA or its Chairman found to be --
>
> (1) arbitrary, capricious, an abuse of discretion, or not in accordance with law;
>
> (2) contrary to constitutional right, power, privilege, or immunity;
>
> (3) in excess of statutory jurisdiction, authority, or limitation, or in violation of a statutory right;
>
> (4) without observance of procedure required by law; or

(b) in the case of a finding of material fact made in reaching a decision on a claim for VA benefits, hold the finding unlawful and set it aside when it is so utterly lacking in a rational evidentiary basis that a manifest and grievous injustice would result if the finding were not set aside;

(c) require a reviewing court, before setting aside a BVA finding of fact, to specify where it finds the record deficient and remand the matter a single time to the Board for further action within a reasonable, specified period of time;

(d) allow the court to review the whole record relating to a BVA-denied claim and require the court to review those parts cited by a party and take account of the rule of prejudicial error;

(e) provide that in no event shall findings of fact made by the Administrator or the Board be subject to trial de novo by the court; and

(f) when a final decision of the Board is adverse to a party and the sole stated basis for such a decision is the failure of such party to comply with any applicable regulation, restrict the court to reviewing only the questions raised as to compliance with and the validity of the regulation.

The reviewing Court would not be authorized to modify the disability rating schedule.

House amendment: The House amendment (proposed new section 4042 of title 38) would require the Court of Veterans Appeals to base its decision on the entire record, but would provide the VA and the petitioner with an opportunity for a hearing, and contains various provisions for the presentation of evidence. Further review (discussed in detail below under the heading "Review by Court of Appeals for the Federal Circuit") would be in the Court of Appeals for the Federal Circuit (CAFC), which would be directed to hold unlawful and set aside any statute or regulation or interpretation thereof, other than a determination as to a factual matter, that the CAFC finds to be --

(a) contrary to constitutional right, power, privilege, or immunity;

(b) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

(c) without observance of procedure required by law;

(d) resting upon a policy judgment, reasoning, or factual premise so unacceptable as to render the matter arbitrary or capricious.

The CAFC would be precluded from reviewing the application of any law or regulation to the facts of the appeal unless a constitutional issue is presented.

Compromise agreement: The compromise agreement (new section 4061 of title 38) makes the Senate provisions applicable to the Court of Veterans Appeals with amendments (a) providing that review of a factual determination shall be in accordance with the "clearly erroneous" standard; (b) deleting the remand requirement (item (c) in the description of the Senate bill); and (c) deleting the provision specifically requiring review of the cited parts of the record.

The Committees note that the "clearly erroneous" standard for review of Board findings of fact is markedly wider than the standard specified in the Senate bill.

Fee for Filing Petition

Senate bill: No provision.

House amendment: The House amendment (proposed new section 4011 of title 38) would allow the Court to impose a fee, not to exceed $50, for the filing of any petition with the Court. Any fee imposed could be waived by the Court upon a demonstration that it would impose a hardship, and a decision on the waiver would not be reviewable in any other court.

Compromise agreement: The compromise agreement (new section 4062 of title 38) contains this provision with an amendment allowing the Court to raise the filing fee periodically, taking into account inflation and the fees charged by other Article I courts.

Representation of Parties; Fee Agreements

Senate bill: No provision.

House amendment: The House amendment (proposed new section 4012 of title 38) would --

(a) provide that the Administrator would be represented before the Court by the the General Counsel of the VA and that petitioners would be represented in accordance with the rules of practice prescribed by the Court, although a qualified person could not be denied admission by reason of failure to be a member of any profession or calling; and

(b) require a person representing a petitioner before the Court to file a copy of any fee agreement with the Court at the time the petition is filed and authorize the Court to review the fee arrangement and order a reduction in the fee if the Court finds the fee to be excessive or unreasonable. Such an order would be final and not reviewable by any other court.

Compromise agreement: The compromise agreement (new section 4063 of title 38) contains this provision with amendments providing that those admitted to a bar or others who meet the criteria established by the court regarding standards for proficiency may represent appellants before the Court and that the Court may review the fee agreement (for representation in the Court or before the BVA or VA) upon a motion by a party or upon the Court's own motion.

The Committees note that appellants may represent themselves before the Court.

Rules of Practice and Procedure

Senate bill: No provision.

House amendment: The House amendment (proposed new section 4013 of title 38) would provide for the Court to prescribe its own rules of practice, procedure, and evidence and provide that the mailing of a pleading, decision, process, or other document relating to proceedings before the Court by certified or registered mail properly addressed to the petitioner would be sufficient service.

Compromise agreement: The compromise agreement (new section 4064 of title 38) contains this provision with an amendment deleting the reference to rules of evidence and deleting the requirement for certified or registered mail.

Contempt Authority; Assistance to the Court

Senate bill: No provision.

House amendment: The House amendment (proposed new section 4014 of title 38) would --

(a) authorize the Court --

(1) to administer oaths, to examine witnesses, and to issue subpoenas requiring the attendance and testimony of witnesses, or the production of necessary documents, or requiring a person to give a deposition;

(2) upon a showing of good cause, to subpoena a VA employee to testify at a hearing or give a deposition; and

(3) to punish certain behaviors it finds to be in contempt of court; and

(b)(1) provide for the Court to have the assistance in carrying out its writ, process, order, rule, decree, or command as is available to a Federal court, and (2) require the U.S. marshal for a district in which the court is sitting, upon the request the Court's chief judge, to attend any session of the Court.

Compromise agreement: The compromise agreement (new section 4065 of title 38) contains this provision with an amendment deleting (a)(1) and (2), above.

Notice of Appeal

Senate bill: The Senate bill (proposed new section 4025(b) of title 38) would provide for judicial review of final decisions of the BVA to be instituted by a civil action brought within 180 days after the mailing by the VA of notice of such a decision.

House amendment: The House amendment (proposed new section 4015 of title 38) prescribes a procedure, substantively similar to current section 4005 of title 38, relating to appeals to the BVA, for the filing of a notice of disagreement with a VA decision and an appeal to the Court, allowing 90 days from the mailing of the statement of the case for the filing of the notice of the appeal.

Compromise agreement: The compromise agreement (new section 4066 of title 38) contains a provision which would authorize judicial review by the Court of a final BVA decision which is adverse to the claimant upon the filing of a notice of appeal within 120 days after the BVA's mailing of notice of the final decision. A copy would also be required to be furnished to the Administrator.

Witness Fees

Senate bill: No provision.

House amendment: The House amendment (proposed new section 4016 of title 38) would require that, where a witness is summoned or a witness's deposition is taken pursuant to a subpoena, the witness be paid the same fee and mileage as a witness in another court of the United States by the party who requested the witness to appear.

Compromise agreement: No provision.

Hearings

Senate bill: No provision.

House amendment: The House amendment (proposed new section 4017 of title 38) would --

(a) require that notice and an opportunity to be heard upon a proceeding being instituted before the Court be given to the petitioner and the Administrator;

(b) authorize the Court in its discretion to close a hearing to the public;

(c) require that the testimony and argument at a hearing be stenographically reported; and

(d) authorize the Court to designate employees of the Court to conduct hearings relating to a case and to make recommendations to the Court with respect to the case.

Compromise agreement: No provision.

Decisions

Senate bill: No provision.

House amendment: The House amendment (proposed new section 4018 of title 38) would --

(a) require that the Court make a decision on a petition as quickly as practicable;

(b) in cases heard by a panel, provide that a majority vote would decide the case;

(c) provide that a decision of a judge or panel would become final 30 days after the date of the report of the decision unless, upon the motion of a party, the request of the judge or panel, or the chief judge's initiative, the chief judge directs that a panel or expanded panel review the case; and

(d) require that each decision state findings of fact and conclusions of law, but allow, subject to conditions prescribed by the Court, the findings and conclusions to be stated orally and transcribed; and

(e) require the Court to designate in its decision any Government records on which it relied and require the VA to preserve records so designated for not less than the period designated by the Administrator of the National Archives and Records Administration.

Compromise agreement: The compromise agreement (new section 4067 of title 38) contains this provision with an amendment deleting the provision in (d), above, authorizing oral decisions, and revising the provision in (c), above, so as to provide for review of the decision by a panel, expanded panel, or the Court en banc, when the Court so directs upon the motion of a party or its own initiative.

Availability of proceedings

Senate bill: No provision.

House amendment: The House amendment (proposed new section 4019 of title 38) would provide that --

(a) all decisions of the Court and evidence received by the Court, including transcripts of its hearings, would be public records open for inspection, except when the Court determines it is necessary to protect such records to prevent the disclosure of confidential information; and

(b) after a decision becomes final, the Court must permit a party to reclaim original documents and other exhibits introduced into evidence or may make such other disposition as it considers advisable.

Compromise agreement: The compromise agreement (new section 4068 of title 38) contains this provision with the reference to "evidence" deleted.

Publication of Decisions

Senate bill: No provision.

House amendment: The House amendment (proposed new section 4020 of title 38) would --

(a) require the chief judge to designate those decisions of the Court which shall have value as precedent;

(b) require the Court to provide for the publication of decisions so designated in such form and manner as may be best adapted for public information and use;

(c) provide that such authorized publication would be competent evidence of the reports of the Court in all courts of the United States and of the several States without further authentication; and

(d) require the reports to be subject to sale in the same manner and on the same terms as other public documents.

Compromise agreement: The compromise agreement (new section 4069 of title 38) contains these provisions with amendments deleting the provision described at (a), above, and authorizing the Court to provide for itself or the chief judge to make appropriate exceptions to the general requirement of publication.

The Committees note that it is up to the Court to decide what is to be published based on this standard. There is no requirement for publication of all its decisions.

SUBCHAPTER III -- MISCELLANEOUS PROVISIONS

Employees

Senate bill: No provision.

House amendment: The House amendment (proposed new section 4031 of title 38) would authorize the Court --

(a) to appoint and pay such employees, in accordance with title 5 competitive service and pay provisions, as are necessary to execute the functions vested in the court, including specifically, physicians and other health professionals to provide it with expert medical advice; and

(b) to classify positions based upon the classification of comparable positions in the judicial branch.

Compromise agreement: The compromise agreement (new section 4081 of title 38) contains this provision with an amendment deleting the specific authority to employ physicians and other health care professionals.

The Committees note that under the general employment authority the Court would have the authority to hire physicians and other health professionals if it so desires and that, therefore, it is not necessary to provide such authority expressly.

Budget and Expenditures

Senate bill: No provision.

House amendment: The House amendment (proposed new section 4032) would authorize the Court to make such expenditures as may be necessary to execute efficiently the functions vested in the Court, with the expenditures to be paid out of appropriated funds (except funds collected as practice fees, which would be used for the purpose of employing independent counsel to pursue disciplinary matters) upon the presentation of itemized vouchers signed by the certifying officer designated by the chief judge.

Compromise agreement: The compromise agreement (new section 4082 of title 38) contains this provision with an amendment that requires the President to submit the budget estimates submitted by the Court without further review in the Executive Branch.

The Committees intend that appropriations be provided directly to the Court.

Disposition of Fees

Senate bill: No provision.

House amendment: The House amendment (proposed new section 4033 of title 38) would require that all fees received by the Court, except fees paid by persons admitted to practice before the Court be deposited into the Treasury as miscellaneous receipts.

Compromise agreement: The compromise agreement (new section 4083 of title 38) contains this provision.

Fee for Transcript of Record

Senate bill: No provision.

House amendment: The House amendment (proposed new section 4034 of title 38) would authorize the Court to fix a fee, not to exceed that charged by district courts, for comparing, or for preparing and comparing, a transcript of the record, or for copying any other papers and the comparison and certification thereof.

Compromise agreement: The compromise agreement (new section 4084 of title 38) contains this provision.

Practice Fee

Senate bill: No provision.

House amendment: The House amendment (proposed new section 4035 of title 38) would --

(a) authorize the Court, in its discretion, to impose a periodic registration fee, not to exceed $30 per year, on persons admitted to practice before the court; and

(b) provide that such fees be available to the Court for the purpose of employing independent counsel to pursue disciplinary matters.

Compromise agreement: The compromise agreement (new section 4085 of title 38) includes this provision with an amendment permitting the Court to use such collected fees for the purpose described above and to offset administrative costs of implementing its standards of proficiency for practitioners before the Court.

SUBCHAPTER IV -- DECISIONS AND REVIEW

Date when Court of Veterans Appeals Decision Becomes Final

Senate bill: No provision.

House amendment: The House amendment (proposed new section 4041 of title 38) would specify when a decision of the Court would become final. Under these provisions, the Court's decision would become final when one of the following occurs:

(a) The time for filing an appeal to the CAFC has expired without an appeal being filed.

(b) The CAFC affirms the decision of the Court or dismisses the appeal and either (1) the time for filing a petition for certiorari to the Supreme Court of the United States has expired without a petition being filed, or (2) a petition for certiorari is denied.

(c) The Supreme Court directs that the decision of the Court be affirmed or the appeal to the CAFC be dismissed and 30 days have expired after the date of the mandate of the Supreme Court.

(d) The Supreme Court orders the decision of the Court to be modified or reversed and either (1) after the Court renders a decision pursuant to the Supreme Court's mandate, 30 days have expired without the petitioner or the Administrator instituting proceedings to have the Court's decision corrected to accord with the Supreme Court's mandate, or (2) either the Administrator or the petitioner institutes such proceedings within that 30 days and the decision is corrected.

(e) The CAFC modifies or reverses the decision of the Court and either (1) the time for filing a petition for certiorari with the Supreme Court has expired without a petition being filed, or (2) a petition for certiorari is denied.

(f) The CAFC modifies or reverses the decision of the Court, the Supreme Court affirms the CAFC's decision, and either (1) after the Court renders a decision pursuant to the CAFC's mandate, 30 days have expired without either the petitioner or the Administrator instituting proceedings to have the Court's decision corrected to accord with the Supreme Court's mandate, or (2) either the Administrator or the petitioner has instituted such proceedings within that 30 days and the decision is corrected.

If either (1) the Supreme Court orders a rehearing, or (2)(A) the CAFC remands the case to the Court for a rehearing, and (B) the time for filing a petition for certiorari has expired without a petition having been filed, such a petition has been denied, or the CAFC's decision has been affirmed by the Supreme Court, the decision of the Court would become final in the same manner as it would if no prior decision of the Court had been rendered.

Compromise agreement: The compromise agreement (new section 4091 of title 38) contains this provision.

Review by Court of Appeals for the Federal Circuit

Senate bill: The Senate bill (proposed new section 4092 of title 38) would --

(a) authorize judicial review of a final decision of the BVA and of a rule or regulation issued or adopted by the Administrator when review thereof is requested by a claimant either in connection with an individual case or in an action brought only for the purpose of obtaining review of such rule or regulation;

(b) prohibit a court from directing or otherwise ordering that any disability rating schedule issued or adopted by the Administrator be modified;

(c) provide that review shall be in the U.S. Court of Appeals for the circuit in which the plaintiff resides or in which the plaintiff's principal place of business is located or in the United States Court of Appeals for the District of Columbia Circuit utilizing the scope of review described above under the heading of "Scope of Review";

(d) require that a claimant must commence a civil action for such review within 180 days after notice of a final BVA decision;

(e) require that the complaint contain sufficient information to permit the Administrator to identify and locate the plaintiff's records, and require the Administrator to file with the court pertinent documents or, if that is too burdensome, an index of those documents;

(f) specify that the court has the power to enter judgment or remand the case;

(g) provide a "sunset" for these provisions; and

(h) prohibit actions under these provisions with respect to chapter 19, relating to insurance and chapter 37, relating to housing and small business loans.

House amendment: The House amendment (proposed new section 4042 of title 38) would provide that --

(a) any party to a decision of the Court may obtain a review of the decision with respect to the validity of any statute or regulation relied on by the Court in making the decision (other than the schedule of ratings for disabilities under section 355 of title 38) and other than a factual determination (utilizing the scope of review discussed above under the heading of "Scope of Review") and that such a review would be obtained by filing a notice of appeal within such time after the notice of such decision is mailed to the petitioner as may be prescribed by the Supreme Court under section 2072 of title 28;

(b) the CAFC would have exclusive jurisdiction of the review described above, and the decision of the CAFC would be final subject to review by the Supreme Court upon *certiorari*, in the manner provided in section 1254 of title 28;

(c) under certain circumstances, an interlocutory appeal may be taken to the CAFC to resolve a controlling question of law if the ultimate determination of the case may be materially advanced by the immediate consideration of the question;

(d) the CAFC would have power to affirm, modify, reverse, or remand the decision of the Court of Veterans Appeals;

(e) rules for review of decisions of the Court of Veterans Appeals would be those prescribed by the Supreme Court under section 2072 of title 28; and

(f) that the CAFC and the Supreme Court may impose fines when a decision of the Court is affirmed and it appears that the notice of appeal was filed merely for delay.

Compromise agreement: The compromise agreement (new section 4092 of title 38) contains the House provision with amendments (a) providing that a notice of appeal must be filed within the time and in the manner prescribed for appeals to the U.S. Courts of Appeals from U.S. District Courts; (b) utilizing the Senate bill's scope of review for regulations, as discussed above under the heading "Scope of Review"; (c) clarifying that the only CVA decisions relating to the schedule of rulings that the CAFC would be precluded from reviewing would be decisions refusing to review issues relating to the schedule; and (d) providing that, except to the extent that an appeal under this chapter presents a Constitutional issue, the CAFC may not review a challenge to a factual determination or a challenge to a law or regulation as applied to the facts of a particular case.

With respect to the revisions in the House language with respect to the scope of review, the Committees note that (except where a challenge is based on Constitutional grounds) the CAFC would not have jurisdiction to review a challenge to a regulation as applied, but only a challenge to a regulation on its face, and could not reach a different conclusion on the facts from that reached below, but must accept the facts as found below.

Transfer of Personnel and Assets of BVA

Senate bill: No provision.

House Amendment: The House amendment (section 7) would require the personnel, assets, liabilities, property and unexpended appropriations, authorizations, allocations, and other funds employed, used, held, arising from, available to or to be made available in connection with functions and offices of the BVA to be transferred to the BVA.

Compromise agreement: No provision.

Initial Appointment of Judges to Court of Veterans Appeals

Senate bill: No provision.

House amendment: The House amendment (section 8) would provide that the President may not appoint an individual to be a deputy chief judge or associate judge of the Court until the chief judge has been appointed, which must be done no later than April 1, 1989.

Compromise agreement: The compromise agreement (section 302) contains this provision with amendments deleting the reference to a deputy chief judge, changing the reference from deputy associate judges to associate judges, and providing that judges may be appointed after Feburary 1, 1989.

TITLE IV -- EFFECTIVE DATES AND APPLICABILITY

EFFECTIVE DATES

Senate bill: The Senate bill (sections 501 and 502) would provide for the Act to take effect on the first day of the first month beginning not less than 180 days after the date of enactment and provide that a civil action for judicial review -- as authorized in subchapter II of chapter 71 as amended by the Senate bill -- would be authorized to be instituted to review decisions of the BVA rendered on or after April 1, 1987.

House amendment: The House amendment (section 9) would provide for the Act to take effect on June 1, 1989; provide that the provisions of the Act would apply in the case of a petitioner who files a notice of disagreement with the VA on or after the date of enactment and that the BVA could not hear or decide such a case; and provide that the attorneys' fees provisions would apply to services rendered after June 1, 1989.

Compromise agreement: The compromise agreement (section 401, 402, and 403) would establish a general effective date of September 1, 1989, and provide for exceptions as follows:

(a) The following provision would take effect on the date of enactment:

(1) Section 201(b), (c), and (d), relating to setting up the new Board of Veterans' Appeals (BVA).

(2) Section 208, relating to the annual report on the BVA.

(3) Section 209, setting limitations on the awarding of performance incentives to BVA members.

(4) Sections 302 and 303, relating to setting up the Court of Veterans Appeals.

(b) Sections 202 through 207, relating to BVA adjudications, would take effect on January 1, 1989.

(c) Section 201(a), relating to the appointment and removal of the Chairman and members of the BVA, would take effect on February 1, 1989.

(d) The amendments made by the compromise agreement with respect to the establishment of judicial review would apply with respect to cases in which a notice of disagreement is filed under section 4005 of title 38 on or after the date of enactment.

(e) Section 104(a), relating to attorneys' fees, would take effect with respect to cases in which a notice of disagreement with a Regional Office decision is filed on or after the date of enactment.

Public Law 100-687
100th Congress

An Act

To amend title 38, United States Code, to establish certain procedures for the adjudication of claims for benefits under laws administered by the Veterans' Administration; to apply the provisions of section 553 of title 5, United States Code, to rulemaking procedures of the Veterans' Administration; to establish a Court of Veterans' Appeals and to provide for judicial review of certain final decisions of the Board of Veterans' Appeals; to provide for the payment of reasonable fees to attorneys for rendering legal representation to individuals claiming benefits under laws administered by the Veterans' Administration; to increase the rates of compensation payable to veterans with service-connected disabilities; and to make various improvements in veterans' health, rehabilitation, and memorial affairs programs; and for other purposes.

Nov. 18, 1988
[S. 11]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

DIVISION A—VETERANS' JUDICIAL REVIEW

Veterans' Judicial Review Act.

SECTION 1. SHORT TITLE; REFERENCES TO TITLE 38, UNITED STATES CODE.

(a) SHORT TITLE.—This division may be cited as the "Veterans' Judicial Review Act". 38 USC 101 note.

(b) REFERENCES.—Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 38, United States Code.

TITLE I—ADJUDICATIVE AND RULEMAKING AUTHORITY OF THE VETERANS' ADMINISTRATION

SEC. 101. DECISIONS BY ADMINISTRATOR.

(a) MATTERS TO BE DECIDED BY ADMINISTRATOR.—Subsection (a) of section 211 is amended to read as follows:

"(a)(1) The Administrator shall decide all questions of law and fact necessary to a decision by the Administrator under a law that affects the provision of benefits by the Administrator to veterans or the dependents or survivors of veterans. Subject to paragraph (2) of this subsection, the decision of the Administrator as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

"(2) The second sentence of paragraph (1) of this subsection does not apply to—

"(A) matters subject to section 223 of this title;

"(B) matters covered by sections 775 and 784 of this title;

"(C) matters arising under chapter 37 of this title; and

"(D) matters covered by chapter 72 of this title.".

(b) Conforming Amendment.—Section 4004(a) is amended by striking out "All questions on claims involving benefits under laws administered by the Veterans' Administration" and inserting in lieu thereof "All questions in a matter which under section 211(a) of this title is subject to decision by the Administrator".

SEC. 102. VETERANS' ADMINISTRATION RULEMAKING.

(a) APA Procedures.—(1) Chapter 3 is amended by inserting after section 222 the following new section:

"§ 223. Rulemaking: procedures and judicial review

"(a) In applying section 552(a)(1) of title 5 to the Veterans' Administration, the Administrator shall ensure that subparagraphs (C), (D), and (E) of that section are complied with, particularly with respect to opinions and interpretations of the General Counsel.

"(b) The provisions of section 553 of title 5 shall apply, without regard to subsection (a)(2) of that section, to matters relating to loans, grants, or benefits under a law administered by the Administrator.

"(c) An action of the Administrator to which section 552(a)(1) or 553 of title 5 (or both) refers (other than an action relating to the adoption or revision of the schedule of ratings for disabilities adopted under section 355 of this title) is subject to judicial review. Such review shall be in accordance with chapter 7 of title 5 and may be sought only in the United States Court of Appeals for the Federal Circuit. However, if such review is sought in connection with an appeal brought under the provisions of chapter 72 of this title, the provisions of that chapter shall apply rather than the provisions of chapter 7 of title 5.".

(2) The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 222 the following new item:

"223. Rulemaking: procedures and judicial review.".

(b) Report on Implementation.—Not later than May 1, 1989, the Administrator shall submit to the Committees on Veterans' Affairs of the Senate and the House of Representatives a report on the implementation of section 223(a) of title 38, United States Code, as added by subsection (a)(1). Such report shall set forth the actions the Administrator is taking to ensure that such section is carried out.

SEC. 103. VETERANS' ADMINISTRATION ADJUDICATION PROCEDURES.

(a) In General.—(1) Chapter 51 is amended by adding at the end of subchapter I the following new sections:

"§ 3007. Burden of proof; benefit of the doubt

"(a) Except when otherwise provided by the Administrator in accordance with the provisions of this title, a person who submits a claim for benefits under a law administered by the Veterans' Administration shall have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded. The Administrator shall assist such a claimant in developing the facts pertinent to the claim. Such assistance shall include requesting information as described in section 3006 of this title.

"(b) When, after consideration of all evidence and material of record in a case before the Veterans' Administration with respect to benefits under laws administered by the Veterans' Administration, there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of the matter, the benefit of the doubt in resolving each such issue shall be given to the claimant. Nothing in this subsection shall be construed as shifting from the claimant to the Administrator the burden specified in subsection (a) of this section.

"§ 3008. Reopening disallowed claims

"If new and material evidence is presented or secured with respect to a claim which has been disallowed, the Administrator shall reopen the claim and review the former disposition of the claim.".

"§ 3009. Independent medical opinions

"(a) When, in the judgment of the Administrator, expert medical opinion, in addition to that available within the Veterans' Administration, is warranted by the medical complexity or controversy involved in a case being considered by the Veterans' Administration, the Administrator may secure an advisory medical opinion from one or more independent medical experts who are not employees of the Veterans' Administration.

"(b) The Administrator shall make necessary arrangements with recognized medical schools, universities, or clinics to furnish such advisory medical opinions. Any such arrangement shall provide that the actual selection of the expert or experts to give the advisory opinion in an individual case shall be made by an appropriate official of such institution.

"(c) The Administrator shall furnish a claimant with notice that an advisory medical opinion has been requested under this section with respect to the claimant's case and shall furnish the claimant with a copy of such opinion when it is received by the Administrator.".

(2) The table of sections at the beginning of such chapter is amended by adding after the item relating to section 3006 the following new items:

"3007. Burden of proof; benefit of the doubt.
"3008. Reopening disallowed claims.
"3009. Independent medical opinions.".

(b) CONFORMING AMENDMENTS.—Section 4009 is amended—

(1) in subsection (a), by striking out "is authorized to" and inserting in lieu thereof "may";

(2) in subsection (b)—

(A) by striking out "Such arrangement will" and inserting in lieu thereof "Any such arrangement shall"; and

(B) by striking out "any individual case will" and inserting in lieu thereof "an individual case shall"; and

(3) by adding at the end the following new subsection:

"(c) The Board shall furnish a claimant with notice that an advisory medical opinion has been requested under this section with respect to the claimant's case and shall furnish the claimant with a copy of such opinion when it is received by the Board.".

(c) TECHNICAL AMENDMENTS.—(1) The items relating to chapter 51 in the table of chapters before part I, and in the table of chapters at the beginning of part IV, are amended by striking out "Applications" and inserting in lieu thereof "Claims".

(2) The heading of chapter 51 is amended to read as follows:

"CHAPTER 51—CLAIMS, EFFECTIVE DATES, AND PAYMENTS".

(3) The item relating to subchapter I in the table of sections at the beginning of chapter 51 is amended by striking out "APPLICATIONS" and inserting in lieu thereof "CLAIMS".

(4) The heading of subchapter I of chapter 51 is amended to read as follows:

"SUBCHAPTER I—CLAIMS".

SEC. 104. ATTORNEYS FEES.

(a) REVISION OF ATTORNEY FEE LIMITATION.—Section 3404 of title 38, United States Code, is amended by striking out subsection (c) and inserting in lieu thereof the following:

"(c)(1) In connection with a proceeding before the Veterans' Administration with respect to benefits under laws administered by the Veterans' Administration, a fee may not be charged, allowed, or paid for services of agents and attorneys with respect to services provided before the date on which the Board of Veterans' Appeals first makes a final decision in the case. Such a fee may be charged, allowed, or paid in the case of services provided after such date only if an agent or attorney is retained with respect to such case before the end of the one-year period beginning on that date. The limitation in the preceding sentence does not apply to services provided with respect to proceedings before a court.

"(2) A person who, acting as agent or attorney in a case referred to in paragraph (1) of this subsection, represents a person before the Veterans' Administration or the Board of Veterans' Appeals after the Board first makes a final decision in the case shall file a copy of any fee agreement between them with the Board at such time as may be specified by the Board. The Board, upon its own motion or the request of either party, may review such a fee agreement and may order a reduction in the fee called for in the agreement if the Board finds that the fee is excessive or unreasonable. A finding or order of the Board under the preceding sentence may be reviewed by the United States Court of Veterans Appeals under section 4063(d) of this title.

"(d)(1) When a claimant and an attorney have entered into a fee agreement described in paragraph (2) of this subsection, the total fee payable to the attorney may not exceed 20 percent of the total amount of any past-due benefits awarded on the basis of the claim.

"(2)(A) A fee agreement referred to in paragraph (1) of this subsection is one under which (i) the amount of the fee payable to the attorney is to be paid to the attorney by the Administrator directly from any past-due benefits awarded on the basis of the claim, and (ii) the amount of the fee is contingent on whether or not the matter is resolved in a manner favorable to the claimant.

"(B) For purposes of subparagraph (A) of this paragraph, a claim shall be considered to have been resolved in a manner favorable to the claimant if all or any part of the relief sought is granted.

"(3) To the extent that past-due benefits are awarded in any proceeding before the Administrator, the Board of Veterans' Appeals, or the United States Court of Veterans Appeals, the Administrator may direct that payment of any attorneys' fee under a fee arrangement described in paragraph (1) of this subsection be made out of such past-due benefits. In no event may the Administrator withhold for the purpose of such payment any portion of benefits payable for a period after the date of the final decision of the Administrator, the Board of Veterans' Appeals, or Court of Veterans Appeals making (or ordering the making of) the award.".

(b) VIOLATION TO BE A MISDEMEANOR.—Section 3405 of such title is amended by striking out "shall be fined not more than $500 or imprisoned at hard labor for not more than two years, or both" and inserting in lieu thereof "shall be fined as provided in title 18, or imprisoned not more than one year, or both".

TITLE II—BOARD OF VETERANS' APPEALS

SEC. 201. APPOINTMENT AND REMOVAL OF THE CHAIRMAN AND MEMBERS.

(a) IN GENERAL.—Subsection (b) of section 4001 is amended to read as follows:

President of U.S.

"(b)(1) The Chairman shall be appointed by the President, by and with the advice and consent of the Senate, for a term of six years. The Chairman may be removed by the President for misconduct, inefficiency, neglect of duty, or engaging in the practice of law or for physical or mental disability which, in the opinion of the President, prevents the proper execution of the Chairman's duties. The Chairman may not be removed from office by the President on any other grounds. Any such removal may only be made after notice and opportunity for hearing.

"(2)(A) The other members of the Board (including the Vice Chairman) shall be appointed by the Administrator, with the approval of the President, based upon recommendations of the Chairman. Each such member shall be appointed for a term of nine years.

"(B) A member of the Board (other than the Chairman) may be removed by the Administrator upon the recommendation of the Chairman. In the case of a removal that would be covered by section 7521 of title 5 in the case of an administrative law judge, a removal of a member of the Board under this paragraph shall be carried out subject to the same requirements as apply to removal of an administrative law judge under that section. Section 554(a)(2) of title 5 shall not apply to a removal action under this subparagraph. In such a removal action, a member shall have the rights set out in section 7513(b) of such title.

"(3) Members (including the Chairman) may be appointed under this subsection to more than one term.

"(4) The Administrator shall designate one member of the Board as Vice Chairman. The Vice Chairman shall perform such functions as the Chairman may specify. Such member shall serve as Vice Chairman at the pleasure of the Administrator.".

(b) SALARY OF CHAIRMAN.—(1) Section 5315 of title 5, United States Code, is amended by adding at the end the following:

"Chairman, Board of Veterans' Appeals.".

Effective date.
5 USC 5315 note.

(2) The amendment made by paragraph (1) shall take effect when the President first appoints an individual as Chairman of the Board of Veterans' Appeals under section 4001(b)(1) of title 38, United States Code (as amended by subsection (a)).

38 USC 4001 note.

(c) TRANSITION TO NEW BOARD.—(1) Appointments of members of the Board of Veterans' Appeals under subsection (b)(2) of section

4001 of title 38, United States Code (as amended by subsection (a)), may not be made until a Chairman is appointed under subsection (b)(1) of that section.

(2) An individual who is serving as a member of the Board on the date of the enactment of this Act may continue to serve as a member until the earlier of—

(A) the date on which the individual's successor (as designated by the Administrator) is appointed under subsection (b)(2) of that section, or

(B) the end of the 180-day period beginning on the day after the date on which the Chairman is appointed under subsection (b)(1) of such section.

38 USC 4001 note.

(d) Initial Terms of Office.—Notwithstanding the second sentence of section 4001(b)(2) of title 38, United States Code (as amended by subsection (a)), specifying the term for which members of the Board of Veterans' Appeals shall be appointed, of the members first appointed under that section—

(A) 22 shall be appointed for a term of three years;

(B) 22 shall be appointed for a term of six years; and

(C) 22 shall be appointed for a term of nine years,

as determined by the Administrator at the time of the initial appointments.

SEC. 202. DETERMINATIONS BY THE BOARD.

(a) Majority Vote in Sections.—Section 4003 is amended to read as follows:

"§ 4003. Determinations by the Board

"(a) Decisions by a section of the Board shall be made by a majority of the members of the section. The decision of the section is final unless the Chairman orders reconsideration of the case.

"(b) If the Chairman orders reconsideration in a case, the case shall upon reconsideration be heard by an expanded section of the Board. When a case is heard by an expanded section of the Board after such a motion for reconsideration, the decision of a majority of the members of the expanded section shall constitute the final decision of the Board.

"(c) Notwithstanding subsections (a) and (b) of this section, the Board on its own motion may correct an obvious error in the record.".

(b) Resources To Dispose of Appeals in a Timely Manner.—Section 4001(a) is amended—

(1) by inserting "and" after "Vice Chairman,";

(2) by striking out "necessary, and" and inserting in lieu thereof "necessary in order to conduct hearings and dispose of appeals properly before the Board in a timely manner. The Board shall have"; and

(3) by adding at the end the following new sentence: "The Board shall have sufficient personnel under the preceding sentence to enable the Board to conduct hearings and consider and dispose of appeals properly before the Board in a timely manner.".

SEC. 203. DECISIONS OF THE BOARD.

(a) Decisions Based on the Record.—Section 4004(a) is amended by adding at the end the following new sentences: "The Board shall decide any such appeal only after affording the claimant an opportunity for a hearing. Decisions of the Board shall be based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation.".

(b) Conforming Amendment.—Section 4005(d)(5) is amended by striking out "will base its decision on the entire record and".

SEC. 204. REOPENING OF DISALLOWED CLAIMS.

Subsection (b) of section 4004 is amended to read as follows:

"(b) Except as provided in section 3008 of this title, when a claim is disallowed by the Board, the claim may not thereafter be reopened and allowed and a claim based upon the same factual basis may not be considered.".

SEC. 205. NOTICE AND CONTENT OF DECISIONS.

Section 4004 is amended by striking out subsection (d) and inserting in lieu thereof the following:

"(d) Each decision of the Board shall include—

"(1) a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record; and

"(2) an order granting appropriate relief or denying relief.

"(e) After reaching a decision in a case, the Board shall promptly mail a copy of its written decision to the claimant and the claimant's authorized representative (if any) at the last known address of the claimant and at the last known address of such representative (if any).".

SEC. 206. STATEMENT OF THE CASE.

(a) Matters To Be Included.—Paragraph (1) of section 4005(d) is amended in the second sentence by striking out "will prepare" and all that follows and inserting in lieu thereof the following: "shall prepare a statement of the case. A statement of the case shall include the following:

"(A) A summary of the evidence in the case pertinent to the issue or issues with which disagreement has been expressed.

"(B) A citation to pertinent laws and regulations and a discussion of how such laws and regulations affect the agency's decision.

"(C) The decision on each issue and a summary of the reasons for such decision.".

(b) Prohibition Against Presumption of Agreement.—Paragraph (4) of such section is amended to read as follows:

"(4) The claimant in any case may not be presumed to agree with any statement of fact contained in the statement of the case to which the claimant does not specifically express agreement.".

SEC. 207. TRAVELING SECTIONS OF THE BOARD.

(a) In General.—Chapter 71 is further amended by adding at the end the following new section:

"§ 4010. Traveling sections

"A claimant may request a hearing before a traveling section of the Board. Any such hearing shall be scheduled for hearing before such a section within the area served by a regional office of the Veterans' Administration in the order in which the requests for hearing are received by the Veterans' Administration with respect to hearings in that area.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of such chapter is amended by adding at the end the following new item:

"4010. Traveling sections.".

SEC. 208. ANNUAL REPORT ON BOARD ACTIVITIES AND RESOURCES.

Section 4001 is amended by adding at the end the following new subsection:

"(d)(1) After the end of each fiscal year, the Chairman shall prepare a report on the activities of the Board during that fiscal year and the projected activities of the Board for the fiscal year during which the report is prepared and the next fiscal year. Such report shall be included in the documents providing detailed information on the budget for the Veterans' Administration that the Administrator submits to the Congress in conjunction with the President's budget submission for any fiscal year pursuant to section 1105 of title 31.

"(2) Each such report shall include, with respect to the preceding fiscal year, information specifying—

"(A) the number of cases appealed to the Board during that year;

"(B) the number of cases pending before the Board at the beginning and at the end of that year;

"(C) the number of such cases which were filed during each of the 36 months preceding the current fiscal year;

"(D) the average length of time a case was before the Board between the time of the filing of an appeal and the disposition during the preceding fiscal year; and

"(E) the number of members of the Board at the end of the year and the number of professional, administrative, clerical, stenographic, and other personnel employed by the Board at the end of the preceding fiscal year.

"(3) The projections in each such report for the current fiscal year and for the next fiscal year shall include (for each such year)—

"(A) an estimate of the number of cases to be appealed to the Board; and

"(B) an evaluation of the ability of the Board (based on existing and projected personnel levels) to ensure timely disposition of such appeals as required by section 4003(d) of this title.".

SEC. 209. LIMITATIONS ON AWARDING PERFORMANCE INCENTIVES TO BOARD MEMBERS.

Section 4001 (as amended by section 208) is further amended by adding at the end the following new subsection:

"(e) A performance incentive that is authorized by law for officers and employees of the Federal Government may be awarded to a member of the Board (including a temporary or acting member) by reason of that member's service on the Board only if the Chairman of the Board determines that such member should be awarded that incentive. A determination by the Chairman for such purpose shall be made taking into consideration the quality of performance of the Board member.".

TITLE III—UNITED STATES COURT OF VETERANS APPEALS

SEC. 301. UNITED STATES COURT OF VETERANS APPEALS.

(a) ESTABLISHMENT OF COURT.—Part V is amended by inserting after chapter 71 the following new chapter:

"CHAPTER 72—UNITED STATES COURT OF VETERANS APPEALS

"SUBCHAPTER I—ORGANIZATION AND JURISDICTION

"Sec.

"4051. Status.
"4052. Jurisdiction; finality of decisions.
"4053. Composition.
"4054. Organization.
"4055. Offices.
"4056. Times and places of sessions.

"SUBCHAPTER II—PROCEDURE

"4061. Scope of review.
"4062. Fee for filing appeals.
'4063. Representation of parties; fee agreements.
'4064. Rules of practice and procedure.
'4065. Contempt authority; assistance to the Court.
'4066. Notice of appeal.
'4067. Decisions.
'4068. Availability of proceedings.
'4069. Publication of decisions.

"SUBCHAPTER III—MISCELLANEOUS PROVISIONS

'4081. Employees.
'4082. Budget and expenditures.
"4083. Disposition of fees.
"4084. Fee for transcript of record.
"4085. Practice fee.

"SUBCHAPTER IV—DECISIONS AND REVIEW

"4091. Date when United States Court of Veterans Appeals decision becomes final.
"4092. Review by United States Court of Appeals for the Federal Circuit.

"SUBCHAPTER I—ORGANIZATION AND JURISDICTION

"§ 4051. Status

"There is hereby established, under Article I of the Constitution of the United States, a court of record to be known as the United States Court of Veterans Appeals.

"§ 4052. Jurisdiction; finality of decisions

"(a) The Court of Veterans Appeals shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals. The Administrator may not seek review of any such decision. The court shall have power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate.

"(b) Review in the Court shall be on the record of proceedings before the Administrator and the Board. The extent of the review shall be limited to the scope provided in section 4061 of this title. The Court may not review the schedule of ratings for disabilities adopted under section 355 of this title or any action of the Administrator in adopting or revising that schedule.

"(c) Decisions by the Court are subject to review as provided in section 4092 of this title.

"§ 4053. Composition

"(a) The Court of Veterans Appeals shall be composed of a chief judge and at least two and not more than six associate judges.

President of U.S.

"(b) The judges of the Court shall be appointed by the President, by and with the advice and consent of the Senate, solely on the grounds of fitness to perform the duties of the office. A person may not be appointed to the Court who is not a member in good standing of the bar of a Federal court or of the highest court of a State. Not more than the number equal to the next whole number greater than one-half of the number of judges of the Court may be members of the same political party.

"(c) The term of office of the judges of the Court of Veterans Appeals shall be 15 years.

"(d) The chief judge is the head of the Court.

"(e)(1) The chief judge of the Court shall receive a salary at the same rate as is received by judges of the United States Courts of Appeals.

"(2) Each judge of the Court, other than the chief judge, shall receive a salary at the same rate as is received by judges of the United States district courts.

"(f)(1) A judge of the Court may be removed from office by the President on grounds of misconduct, neglect of duty, engaging in the practice of law, or physical or mental disability which, in the opinion of the President, prevents the proper execution of the judge's duties. A judge of the Court may not be removed from office by the President on any other ground.

"(2) Before a judge may be removed from office under this subsection, the judge shall be provided with a full specification of the reasons for the removal and an opportunity to be heard.

"§ 4054. Organization

"(a) The Court of Veterans Appeals shall have a seal which shall be judicially noticed.

"(b) The Court may hear cases by judges sitting alone or in panels, as determined pursuant to procedures established by the Court. Any such panel shall have not less than three judges. The Court shall establish procedures for the assignment of the judges of the Court to such panels and for the designation of the chief of each such panel.

"(c)(1) A majority of the judges of the Court shall constitute a quorum for the transaction of the business of the Court. A vacancy in the Court shall not impair the powers or affect the duties of the Court or of the remaining judges of the Court.

"(2) A majority of the judges of a panel of the Court shall constitute a quorum for the transaction of the business of the panel. A vacancy in a panel of the Court shall not impair the powers or affect the duties of the panel or of the remaining judges of the panel.

"§ 4055. Offices

District of Columbia.

"The principal office of the Court of Veterans Appeals shall be in the District of Columbia, but the Court may sit at any place within the United States.

"§ 4056. Times and places of sessions

"The times and places of sessions of the Court of Veterans Appeals shall be prescribed by the chief judge.

"SUBCHAPTER II—PROCEDURE

"§ 4061. Scope of review

"(a) In any action brought under this chapter, the Court of Veterans Appeals, to the extent necessary to its decision and when presented, shall—

"(1) decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions, and determine the meaning or applicability of the terms of an action of the Administrator;

"(2) compel action of the Administrator unlawfully withheld;

"(3) hold unlawful and set aside decisions, findings (other than those described in clause (4) of this subsection), conclusions, rules, and regulations issued or adopted by the Administrator, the Board of Veterans' Appeals, or the Chairman of the Board found to be—

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

"(B) contrary to constitutional right, power, privilege, or immunity;

"(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

"(D) without observance of procedure required by law; and

"(4) in the case of a finding of material fact made in reaching a decision in a case before the Veterans' Administration with respect to benefits under laws administered by the Veterans' Administration, hold unlawful and set aside such finding if the finding is clearly erroneous.

"(b) In making the determinations under subsection (a) of this section, the Court shall take due account of the rule of prejudicial error.

"(c) In no event shall findings of fact made by the Administrator or the Board of Veterans' Appeals be subject to trial de novo by the court.

"(d) When a final decision of the Board of Veterans' Appeals is adverse to a party and the sole stated basis for such decision is the failure of the party to comply with any applicable regulation prescribed by the Administrator, the Court shall review only questions raised as to compliance with and the validity of the regulation.

"§ 4062. Fee for filing appeals

"(a) The Court of Veterans Appeals may impose a fee of not more than $50 for the filing of any appeal with the Court. The Court shall establish procedures under which such a fee may be waived in the case of an appeal filed by or on behalf of a person who demonstrates that the requirement that such fee be paid will impose a hardship on that person. A decision as to such a waiver is final and may not be reviewed in any other court.

"(b) The Court may from time to time adjust the maximum amount permitted for a fee imposed under subsection (a) of this section based upon inflation and similar fees charged by other courts established under Article I of the Constitution.

"§ 4063. Representation of parties; fee agreements

"(a) The Administrator shall be represented before the Court of Veterans Appeals by the General Counsel of the Veterans' Administration.

"(b) Representation of appellants shall be in accordance with the rules of practice prescribed by the Court under section 4064 of this title. In addition to members of the bar admitted to practice before the Court in accordance with such rules of practice, the Court may allow other persons to practice before the Court who meet standards of proficiency prescribed in such rules of practice.

"(c) A person who represents an appellant before the Court shall file a copy of any fee agreement between the appellant and that person with the Court at the time the appeal is filed. The Court, on its own motion or the motion of any party, may review such a fee agreement.

"(d) In reviewing a fee agreement under subsection (c) of this section or under section 3404(c)(2) of this title, the Court may affirm the finding or order of the Board and may order a reduction in the fee called for in the agreement if it finds that the fee is excessive or unreasonable. An order of the Court under this subsection is final and may not be reviewed in any other court.

"§ 4064. Rules of practice and procedure

"(a) The proceedings of the Court of Veterans Appeals shall be conducted in accordance with such rules of practice and procedure as the Court prescribes.

"(b) The mailing of a pleading, decision, order, notice, or process in respect of proceedings before the Court shall be held sufficient service of such pleading, decision, order, notice, or process if it is properly addressed to the address furnished by the appellant on the notice of appeal filed under section 4066 of this title.

"§ 4065. Contempt authority; assistance to the Court

"(a) The Court shall have power to punish by fine or imprisonment such contempt of its authority as—

"(1) misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

"(2) misbehavior of any of its officers in their official transactions; or

"(3) disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

"(b) The Court shall have such assistance in the carrying out of its lawful writ, process, order, rule, decree, or command as is available to a court of the United States. The United States marshal for a district in which the Court is sitting shall, if requested by the chief judge of the Court, attend any session of the Court in that district.

"§ 4066. Notice of appeal

"(a) In order to obtain review by the Court of Veterans Appeals of a final decision of the Board of Veterans' Appeals, a person adversely affected by that action must file a notice of appeal with the Court. Any such notice must be filed within 120 days after the date on which notice of the decision is mailed pursuant to section 4004(e) of this title.

"(b) The appellant shall also furnish the Administrator with a copy of such notice, but a failure to do so shall not constitute a failure of timely compliance with subsection (a) of this section.

"§ 4067. Decisions

"(a) A decision upon a proceeding before the Court of Veterans Appeals shall be made as quickly as practicable. In a case heard by a panel of the Court, the decision shall be made by a majority vote of the panel in accordance with the rules of the Court. The decision of the judge or panel hearing the case so made shall be the decision of the Court except as provided in subsection (d) of this section.

"(b) The Court shall include in its decision a statement of its conclusions of law and determinations as to factual matters.

"(c) A judge or panel shall make a determination upon any proceeding before the Court, and any motion in connection with such a proceeding, that is assigned to the judge or panel. The judge or panel shall make a report of any such determination which constitutes the judge or panel's final disposition of the proceeding.

Reports.

"(d)(1) In the case of a proceeding determined by a single judge of the Court, the decision of the judge shall become the decision of the Court unless before the end of the 30-day period beginning on the date of the decision by the judge the Court, upon the motion of either party or on its own initiative, directs that the decision be reviewed by a panel of the Court. In such a case, the decision of the judge initially deciding the case shall not be a part of the record.

"(2) In the case of a proceeding determined by a panel of the Court, the decision of the panel shall become the decision of the Court unless before the end of the 30-day period beginning on the date of the decision by the panel the Court, upon the motion of either party or on its own initiative, directs that the decision be reviewed by an expanded panel of the Court (or the Court en banc). In such a case, the decision of the panel initially deciding the case shall not be a part of the record.

"(e) The Court shall designate in its decision in any case those specific records of the Government on which it relied (if any) in making its decision. The Administrator shall preserve records so designated for not less than the period of time designated by the Administrator of the National Archives and Records Administration.

Records.
Historic preservation.

"§ 4068. Availability of proceedings

Records.
Public information.

"(a) Except as provided in subsection (b) of this section, all decisions of the Court of Veterans Appeals and all briefs, motions, documents, and exhibits received by the Court (including a transcript of the stenographic report of the hearings) shall be public records open to the inspection of the public.

"(b)(1) The Court may make any provision which is necessary to prevent the disclosure of confidential information, including a provision that any such document or information be placed under seal to be opened only as directed by the Court.

Classified information.

"(2) After the decision of the Court in a proceeding becomes final, the Court shall permit the withdrawal by the party entitled thereto of originals of books, documents, and records, and of models, diagrams, and other exhibits, submitted to the Court before the Court may, on its own motion, make such other disposition thereof as it considers advisable.

"§ 4069. Publication of decisions

Public information.

"(a) The Court of Veterans Appeals shall provide for the publication of decisions of the Court in such form and manner as may be best adapted for public information and use. The Court may make such exceptions, or may authorize the chief judge to make such exceptions, to the requirement for publication in the preceding sentence as may be appropriate.

"(b) Such authorized publication shall be competent evidence of the decisions of the Court of Veterans Appeals therein contained in all courts of the United States and of the several States without any further proof or authentication thereof.

"(c) Such publications shall be subject to sale in the same manner and upon the same terms as other public documents.

"SUBCHAPTER III—MISCELLANEOUS PROVISIONS

"§ 4081. Employees

"The Court of Veterans Appeals may appoint such employees as may be necessary to execute the functions vested in the Court. Such appointments shall be made in accordance with the provisions of title 5 governing appointment in the competitive service, except that the Court may classify such positions based upon the classification of comparable positions in the judicial branch. The basic pay of such employees shall be fixed in accordance with subchapter III of chapter 53 of title 5.

"§ 4082. Budget and expenditures

"(a) The budget of the Court of Veterans Appeals as submitted by the Court for inclusion in the budget of the President for any fiscal year shall be included in that budget without review within the executive branch.

"(b) The Court may make such expenditures (including expenditures for personal services and rent at the seat of Government and elsewhere, and for law books, books of reference, and periodicals) as may be necessary to execute efficiently the functions vested in the Court.

"(c) All expenditures of the Court shall be allowed and paid upon presentation of itemized vouchers signed by the certifying officer designated by the chief judge. Except as provided in section 4085 of this title, all such expenditures shall be paid out of moneys appropriated for purposes of the Court.

"§ 4083. Disposition of fees

"Except for amounts received pursuant to section 4085 of this title, all fees received by the Court of Veterans Appeals shall be covered into the Treasury as miscellaneous receipts.

"§ 4084. Fee for transcript of record

"The Court of Veterans Appeals may fix a fee, not in excess of the fee authorized by law to be charged and collected therefor by the clerks of the district courts, for comparing, or for preparing and comparing, a transcript of the record of any proceeding before the Court, or for copying any record, entry, or other paper and the comparison and certification thereof.

"§ 4085. Practice fee

"(a) The Court of Veterans Appeals may impose a periodic registration fee on persons admitted to practice before the Court. The frequency and amount of such fee shall be determined by the Court, except that such amount may not exceed $30 per year.

"(b) Amounts received by the Court under subsection (a) of this section shall be available to the Court for the purposes of (1) employing independent counsel to pursue disciplinary matters, and (2) defraying administrative costs for the implementation of the standards of proficiency prescribed for practice before the Court.

"SUBCHAPTER IV—DECISIONS AND REVIEW

"§ 4091. Date when United States Court of Veterans Appeals decision becomes final

"(a) A decision of the United States Court of Veterans Appeals shall become final upon the expiration of the time allowed for filing, under section 4092 of this title, a notice of appeal from such decision, if no such notice is duly filed within such time. If such a notice is filed within such time, such a decision shall become final—

"(1) upon the expiration of the time allowed for filing a petition for certiorari with the Supreme Court of the United States, if the decision of the Court of Veterans Appeals is affirmed or the appeal is dismissed by the United States Court of Appeals for the Federal Circuit and no petition for certiorari is duly filed;

"(2) upon the denial of a petition for certiorari, if the decision of the Court of Veterans Appeals is affirmed or the appeal is dismissed by the United States Court of Appeals for the Federal Circuit; or

"(3) upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court, if that Court directs that the decision of the Court of Veterans Appeals be affirmed or the appeal dismissed.

"(b)(1) If the Supreme Court directs that the decision of the Court of Veterans Appeals be modified or reversed, the decision of the Court of Veterans Appeals rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of 30 days from the time it was rendered, unless within such 30 days either the Administrator or the petitioner has instituted proceedings to have such decision corrected to accord with the mandate, in which event the decision of the Court of Veterans Appeals shall become final when so corrected.

"(2) If the decision of the Court of Veterans Appeals is modified or reversed by the United States Court of Appeals for the Federal Circuit and if—

"(A) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or

"(B) the petition for certiorari has been denied, or

"(C) the decision of the United States Court of Appeals for the Federal Circuit has been affirmed by the Supreme Court,

then the decision of the Court of Veterans Appeals rendered in accordance with the mandate of the United States Court of Appeals for the Federal Circuit shall become final upon the expiration of 30 days from the time such decision of the Court of Veterans Appeals was rendered, unless within such 30 days either the Administrator or the petitioner has instituted proceedings to have such decision corrected so that it will accord with the mandate, in which event the decision of the Court of Veterans Appeals shall become final when so corrected.

"(c) If the Supreme Court orders a rehearing, or if the case is remanded by the United States Court of Appeals for the Federal Circuit to the Court of Veterans Appeals for a rehearing, and if—

"(1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or

"(2) the petition for certiorari has been denied, or

"(3) the decision of the United States Court of Appeals for the Federal Circuit has been affirmed by the Supreme Court,

then the decision of the Court of Veterans Appeals rendered upon such rehearing shall become final in the same manner as though no prior decision of the Court of Veterans Appeals had been rendered.

"(d) As used in this section, the term 'mandate', in case a mandate has been recalled before the expiration of 30 days from the date of issuance thereof, means the final mandate.

"§ 4092. Review by United States Court of Appeals for the Federal Circuit

"(a) After a decision of the United States Court of Veterans Appeals is entered in a case, any party to the case may obtain a review of the decision with respect to the validity of any statute or regulation (other than a refusal to review the schedule of ratings for disabilities adopted under section 355 of this title) or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court in making the decision. Such a review shall be obtained by filing a notice of appeal with the Court of Veterans Appeals within the time and in the manner prescribed for appeal to United States courts of appeals from United States district courts.

"(b)(1) When a judge or panel of the Court of Veterans Appeals, in making an order not otherwise appealable under this section, determines that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that there is in fact a disagreement between the appellant and the Administrator with respect to that question of law and that the ultimate termination of the case may be materially advanced by the immediate consideration of that question, the judge or panel shall notify the chief judge of that determination. Upon receiving such a notification, the chief judge shall certify that such a question is presented, and any party to the case may then petition the Court of Appeals for the Federal Circuit to decide the question. That court may permit an interlocutory appeal to be taken on that question if such a petition is filed with it within 10 days after the certification by the chief judge of the Court of Veterans Appeals. Neither the application for, nor the granting of, an appeal under this paragraph shall stay proceedings in the Court of Veterans Appeals, unless a stay is ordered by a judge of the Court of Veterans Appeals or by the Court of Appeals for the Federal Circuit.

"(2) For purposes of subsections (d) and (e) of this section, an order described in this paragraph shall be treated as a decision of the Court of Veterans Appeals.

"(c) The United States Courts of Appeals for the Federal Circuit shall have exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof brought under this section, and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision. The judgment of such court shall be final subject to review by the Supreme Court upon certiorari, in the manner provided in section 1254 of title 28.

"(d)(1) The Court of Appeals for the Federal Circuit shall decide all relevant questions of law, including interpreting constitutional and statutory provisions. The court shall hold unlawful and set aside any statute or regulation or any interpretation thereof (other than a determination as to a factual matter) that was relied upon in the decision of the Court of Veterans Appeals that the Court of Appeals for the Federal Circuit finds to be—

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

"(B) contrary to constitutional right, power, privilege, or immunity;

"(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

"(D) without observance of procedure required by law.

"(2) Except to the extent that an appeal under this chapter presents a constitutional issue, the Court of Appeals may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case.

"(e)(1) Upon such review, the Court of Appeals for the Federal Circuit shall have power to affirm or, if the decision of the Court of Veterans Appeals is not in accordance with law, to modify or reverse the decision of the Court of Veterans Appeals or to remand the matter, as appropriate.

"(2) Rules for review of decisions of the Court of Veterans Appeals shall be those prescribed by the Supreme Court under section 2072 of title 28.".

(b) Clerical Amendment.—The tables of chapters before part I and at the beginning of part V are each amended by inserting after the item relating to chapter 71 the following new item:

"72. Court of Veterans Appeals .... 4051".

SEC. 302. INITIAL APPOINTMENT OF JUDGES TO COURT OF VETERANS APPEALS.

38 USC 4053 note.

(a) Chief Judge To Be Appointed First.—The President may not appoint an individual to be an associate judge of the United States Court of Veterans Appeals under section 4053(b) of title 38, United States Code, as added by section 301, until the chief judge of such Court has been appointed. The President shall, during the period beginning on January 21, 1989, and ending on April 1, 1989, nominate an individual for appointment to the position of chief judge of such Court.

President of U.S.

(b) Judges.—Subject to subsection (a), judges of the Court of Veterans Appeals may be appointed after February 1, 1989.

SEC. 303. FACILITY FOR PRINCIPAL OFFICE OF COURT.

38 USC 4055 note.

In the implementation of section 4055 of title 38, United States Code (as added by section 301), the principal office of the Court of Veterans Appeals shall initially be located, if practicable, in a facility existing on the date of the enactment of this Act that, as determined by the Administrative Office of the United States Courts, would facilitate maximum efficiency and economy in the operation of the Court. The Administrative Office of the United

States Courts shall take into consideration the convenience of the location of such facility to needed library resources, clerical and administrative support equipment and personnel, and other resources available for shared use by the Court and other courts or agencies of the Federal Government.

TITLE IV—EFFECTIVE DATES AND APPLICABILITY

38 USC 4051 note.

SEC. 401. EFFECTIVE DATES.

(a) General Effective Date.—Except as otherwise provided in this section, this division (and the amendments made by this Act) shall take effect on September 1, 1989.

(b) Effective Date for Certain Transition Provisions.—The amendment made by section 201(a) shall take effect on February 1, 1989.

(c) Date of Enactment.—Sections 201 (other than subsection (a)), 208, 209, 302, and 303, and the amendments made by those sections, shall take effect on the date of the enactment of this Act.

(d) Board of Veterans' Appeals.—Sections 202 through 207 shall take effect on January 1, 1989.

(e) Commencement of Operation of Court of Veterans Appeals.—Notwithstanding subsection (a), the United States Court of Veterans Appeals established pursuant to chapter 72 of title 38, United States Code (as added by section 301) shall not begin to operate until at least three judges have been appointed to the court.

38 USC 4051 note.

SEC. 402. APPLICABILITY TO CASES AFTER DATE OF ENACTMENT.

Chapter 72 of title 38, United States Code, as added by section 301, shall apply with respect to any case in which a notice of disagreement is filed under section 4005 of title 38, United States Code, on or after the date of the enactment of this Act.

38 USC 3404 note.

SEC. 403. APPLICABILITY TO ATTORNEYS FEES.

The amendment to section 3404(c) of title 38, United States Code, made by section 104(a) shall apply only with respect to services of agents and attorneys in cases in which a notice of disagreement is filed with the Veterans' Administration on or after the date of the enactment of this division.

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